CUSTOM AND USAGE (

1. CUSTOM

(1) MEANING AND CHARACTER OF CUSTOM

601. Meaning and scope of custom.

A custom is a particular rule which has obtained either actually or presumptively from time immemorial in a particular locality and obtained the force of law in that locality[1], although contrary to, or not consistent with, the general common law of the realm[2].

Local customs were in being before the common law, but the rise of central judicial institutions in the twelfth and thirteenth centuries made the common law at an early date the normal rule throughout the realm and local variations soon became exceptional. The royal judges were showing some hostility towards local custom as early as the time of Edward II[3]. Nevertheless, to this day a local custom is recognised by the courts as taking priority over a general rule of common law if certain strict requirements are met. In practice, custom has lost much of its importance since 1925, when widespread local customs governing the tenure of land were abolished[4].

A custom is local law, the law of a place ('lex loci')[5]. It imports some general rule applying within the district where it operates, and cannot therefore arise from a few mere private acts of individuals[6]. As regards the matter to which it relates, a custom takes the place of the general common law and, in respect of that matter, is the local law within the particular locality where it obtains[7]. Although local customs are of co-ordinate authority with the common law[8], there is no part of the realm where the common law does not run, and all local customs wherever they may operate are subject to judicial review in accordance with the principles of common law which govern the validity of customs[9].

A custom governs only some particular matter or matters; other matters within the locality where it operates are governed by the common law of the realm. A custom cannot generally operate against the Crown[10].

The word 'custom' is sometimes used more loosely to denote habits and usages not conforming to the above definition[11], but only an immemorial local custom is capable of having the force of law independently of contract[12].

1 *Tanistry Case* (1608) Dav Ir 28 at 31-32 (where it is said that custom in the intendment of law is such a usage as has obtained the force of law and is in truth a binding law as regards the particular place, persons, and things which it concerns; 'custom is a reasonable act iterated, multiplied, and continued by the people from time out of mind, and that is the definition of custom, which has the virtue and force of law').

2 *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch, per Tindal CJ.

3 See *FitzSamuel v Braythe* (1312) YB Mich 6 Edw 2 (34 Selden Soc) 199 per Bereford CJ.

4 See the Law of Property Act 1922 s 122, Sch 4 (repealed); the Administration of Estates Act 1925 s 45(1)(a). The most important customs abolished as from 1 January 1926 were those governing the descent and

incidents of copyhold land: see PARAS 628, 643 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 662.

5 YB Mich 21 Edw 4, f 55, pl 28, at f 57 per Catesby J; *Linn-Regis Corpn v Taylor* (1684) 3 Lev 160; *Wilkes v Broadbent* (1745) 2 Stra 1224; *Millar v Taylor* (1769) 4 Burr 2303 at 2368 per Yates J (custom is '*lex loci*, the law of the place'); *Clarkson v Woodhouse* (1782) 5 Term Rep 412n per Lord Mansfield CJ; *Egerton v Harding* [1975] QB 62 at 68, [1974] 3 All ER 689 at 691, CA, per Scarman LJ ('Custom, being local law, displaces within its locality the common law'). Cf Bracton f 2b (custom is observed as law in places where it has been approved by usage, and obtains the force of law); *R v City of London* (1321) 85 Selden Soc 35 ('lour usage est lour lay').

6 *Millar v Taylor* (1769) 4 Burr 2303 at 2368, per Yates J (who adds that 'All customs operate (if they have any operation) as positive laws'); *Leuckart v Cooper* (1835) 7 C & P 119. It is otherwise of a formal act, such as an entry on the court rolls of a manor: see PARA 622 note 6 post.

7 1 Bl Com (14th Edn) 17, 24; *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch, per Tindal CJ; *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch, per Tindal CJ; *Hammerton v Honey* (1876) 24 WR 603; *Anglo-Hellenic Steamship Co Ltd v Louis Dreyfus & Co* (1913) 108 LT 36 at 37; *Wyld v Silver* [1963] Ch 243 at 254, [1962] 3 All ER 309 at 312, CA, per Lord Denning MR; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA.

8 See *Re Smart, Smart v Smart* (1881) 18 ChD 165 at 170 per Bacon V-C ('customs of a manor are of equal authority with, and as equally binding as, the common law. Their antiquity is perhaps greater than that which can be ascribed to the common law').

9 *Rogers v Brenton* (1847) 10 QB 26 at 62-63 (customs of the stannaries of Cornwall are no more outside the survey of the common law than any other local customs).

10 *R v Abbot of Selby* (1329) 97 Selden Soc 137; *Stonor v Abbot of Buckfast* (1347) YB Hil 21 Edw 3, f 4, pl 11 per Shareshull J; *Re Ralph Jordan* (1375) YB Hil 49 Edw 3, f 3, pl 7 (custom of London to make corporations held void, because only the king can do it; cited with approval in *Anon* (1688) 3 Mod Rep 193; *Cudden v Estwick* (1704) 1 Salk 192; but cf the alleged custom of London to found colleges and chantries, pleaded in *Cetito v Duke of Suffolk* (1526) CP 40/1052, m 844); *Grimesby's Case* (1456) YB Mich 35 Hen 6, f 25, pl 33, at f 29a, per Prisot CJ; *Tanistry Case* (1608) Dav Ir 28 at 33b para 4. There was, however, a custom of the county palatine of Chester disallowing prerogative wardship there (1 Rolle Abr 566, Custome (D) 5). Bacon Abr, Customs (B), suggested that the statutory abrogation of the maxim 'nullum tempus occurrit regi' by 9 Geo 3 c 16 put an end to this doctrine. However, a custom against the prerogative would not have been enjoyed as of right prior to 1769.

11 For instances of this wider use of the term 'custom' see YB Mich 8 Hen 6, f 3, pl 9, at f 4, per Rolf sjt (usage and custom are equipollent); *Wigglesworth v Dallison* (1779) 1 Doug KB 201 (usage as to tenant farmers); *Gibson v Crick* (1862) 1 H & C 142 at 144-145 per Pollock CB, and at 147 per Wilde B; *Brown v Byrne* (1854) 3 E & B 703 at 714 et seq (usage of the port of Liverpool); *Hutchinson v Tatham* (1873) LR 8 CP 482 at 484 et seq (shippers' usage); *Tucker v Linger* (1883) 8 App Cas 508, HL (practice of recent origin for tenant farmers to sell flints turned up in course of husbandry); *Hutcheson v Eaton* (1884) 13 QBD 861 at 866, CA; *Devonald v Rosser & Sons* [1906] 2 KB 728, CA; *Re North Western Rubber Co Ltd and Huttenbach & Co* [1908] 2 KB 907, CA (alleged shippers' usage); *Blandy Bros & Co LDA v Nello Simoni Ltd* [1963] 2 Lloyd's Rep 393 at 400, CA, per Willmer LJ (trade usage); *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC (mercantile usage confused with local custom in the strict sense); *McGowan (Inspector of Taxes) v Brown and Cousins (t/a Stuart Edwards)* [1977] 3 All ER 844 at 848, [1977] 1 WLR 1403 at 1404 per Templeman J (practice followed by estate agents). See also PARA 605 post.

12 See PARA 651 post. In *Plumer v Leicester* (1329) 97 Selden Soc 45 at 46 concerning a franchise, Scrope CJ drew a distinction between usage de jure (from time immemorial) and usage de facto (beginning in recent times).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(1) MEANING AND CHARACTER OF CUSTOM/602. Custom as local law.

602. Custom as local law.

A custom may have the force of law only if it is confined in its sphere of operation to a particular locality which may be defined with precision[1]. Although some of the old forms of action made mention of 'customs of the realm of England'[2], these customs were merely rules of common law[3], and since the abolition of the old forms of procedure it is unhelpful to think of

customs operating throughout the realm: such 'customs' must either be common law[4] or perhaps, in some cases, ancient usages of which the courts take notice[5].

It has been suggested that the conventions of the constitution operate as customs[6], but it seems better to regard them either as principles of common law or as extralegal usages. Likewise the customs of a profession: for example, the custom that a barrister did not enter into contractual relations with his client was merely a usage[7], as is the custom of not accepting instructions directly from the lay client[8], whereas the barrister's immunity from suits for negligence in respect of advocacy work was a rule of common law which has now been put onto a statutory basis[9]. There are some references in older books to the procedural and professional practices of each of the central courts as being customs; nevertheless, although each court had different usages, they were all regarded as part of the common law[10].

The phrase 'mercantile custom' or 'custom of merchants' ('consuetudo mercatorum') was sometimes used in common-law pleadings to denote rules having the force of law throughout England[11], though the allegation of such a custom was surplusage[12] and today any mercantile custom which is supposed to obtain universally throughout the realm[13], and has not been embodied in legislation, is to be classified either as a rule of common law[14] or (if not having the force of law) as a mere usage affecting the content and interpretation of contracts[15].

It is possible for a custom to be bilocal, as in the case of a custom which binds merchants trading between two particular cities[16]. There cannot, however, be a custom in one place to do something in another place[17].

1 *R v Abbot of Selby* (1329) 97 Selden Soc 137 per Scrope CJ ('A thing which is against common right may not be maintained simply on the strength of usage unless it is the usage of an entire district ('usage de pays')'); Co Litt 113b; *Millar v Taylor* (1769) 4 Burr 2303 at 2368; and see *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA. For the certainty required in defining the locality see PARA 616 post.

2 Eg in false imprisonment, pound breach, partition, and the actions on the case brought against innkeepers, for the spread of fire, or against common carriers for the loss of goods. Note also the precedent of circa 1675 in *The Clerk's Manual* (1678) p 70 (alleged custom of the realm to drive carefully).

3 YB Mich 30 Edw 3, f 25 per Finchden sjt; *Beaulieu v Finglam* (1401) YB Pas 2 Hen 4, f 18, pl 6, per curiam; *Horslow's Case* (1443) YB Mich 22 Hen 6, f 21, pl 38 per Newton CJ; YB Mich 8 Edw 4, f 18, pl 30, at f 19 per Littleton J; *Rollesley v Toft* (1495) 102 Selden Soc 31 per Kebell sjt; *Anon* (1582) Cro Eliz 10; Co Litt 89a (n 7), 110b ('A custom cannot be alleged generally within the Kingdom of England: for that is the common law'); *Millar v Taylor* (1769) 4 Burr 2303 at 2368 per Yates J ('if the custom be general, it is the law of the realm'); *Gifford v Lord Yarborough* (1828) 5 Bing 163 at 164, HL; *Earl of Coventry v Willes* (1863) 12 WR 127 at 128 per Cockburn CJ. The courts take judicial notice of such customs, and so it was unnecessary, even before the pleading reforms of the last century, to plead them: *Gifford v Lord Yarborough* supra per Best CJ; *Pozzi v Shipton* (1838) 8 Ad & El 963 at 974 per Patteson J. As to the law merchant as a form of custom of the realm see PARA 662 post.

4 For alleged customs used throughout the realm which were held not to be established as common law rights see *Steel v Houghton* (1788) 1 H Bla 51 (alleged custom for the poor to glean after harvest); *Blundell v Catterall* (1821) 5 B & Ald 268 (where Best J held, at 278, that since men have bathed in the sea since time immemorial there must be a common law right of access across the shore for that purpose; but the other members of the court did not find the right to be established); *Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808 at 840, [1967] 2 All ER 472 at 490 per Megaw J, explaining *A-G v Wright* [1897] 2 QB 318, CA (alleged immemorial custom for boat owners to moor boats on the foreshore). Any such rights as these must therefore be claimed either by local custom (for the inhabitants of a place) or by grant or prescription (for individuals).

5 For instance, the rule of the road. This is first noted in the eighteenth century, but has since been put on a statutory basis for certain purposes: see the Highway Act 1835 s 78 (as amended); the Road Traffic Act 1988 s 38(7) (referring to the Highway Code); and NEGLIGENCE vol 78 (2010) PARA 54; ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 221. Apart from statute, it was best regarded as a social usage, to be noticed as a fact (eg in determining whether a driver was negligent), rather than a rule of law: *Tayler's Case* (1780) 23 Annual Register 199 per Nares J; *Cruden v Fentham* (1798) 2 Esp 685; *Leame v Bray* (1803) 3 East 593. In *Salter v Sellars* (1967) Times, 27 May, CA, it was doubted whether pedestrians were bound always to walk on the right-hand side when there was no footpath.

6 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 19-22.

7 See the Courts and Legal Services Act 1990 s 61(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 1124.

8 *Doe d Bennett v Hale and Davis* (1850) 15 QB 171; *Re T (A Barrister)* [1982] QB 430, [1981] 2 All ER 1105; and see LEGAL PROFESSIONS vol 66 (2009) PARA 1173.

9 See the Courts and Legal Services Act 1990 s 62(2). See also LEGAL PROFESSIONS vol 66 (2009) PARA 1144-1145.

10 Eg *Wallyng v Meger* (1470) YB Pas 10 Edw 4 (47 Selden Soc) 38 (privilege of officers of the King's Bench treated as custom); *Kyngeston v Dryland* (1505) CP 40/973, m 418d (custom as to suits against attorneys pleaded as 'consuetudo'); *Smythe's Case* (1558) 109 Selden Soc 23, 25 ('common custom, usage and law of the realm, and of the court' of Common Pleas); *Lee's Case* (1567) 109 Selden Soc 143-144 (privilege of officers of the Common Pleas as 'law and custom of the realm'); *Lord Mounson v Bourn* (1638) Cro Car 527 at 528 per Bramston CJ. Cf *Paston v Jenney* (1471) YB Trin 11 Edw 4, f 2, pl 4 (usage as to serjeants at law treated as a prescription by a fluctuating and unincorporated class; in the variant report in 64 Selden Soc 189, Bryan CJ said that a custom could not be claimed in the Common Pleas because the court followed the common law).

On the other hand, the variable procedures of local courts were effective as local customs, if they satisfied the requirements of antiquity and reasonableness. Most surviving local courts were abolished by the Administration of Justice Act 1977 s 23, Sch 4: see PARA 699 post.

The Court of Chivalry follows the 'customs and usages' of the law of arms, which are sometimes said not to be part of the common law (though they are universal throughout England and Wales): *Manchester Corpn v Manchester Palace of Varieties Ltd* [1955] P 133, Ct of Chiv.

11 Eg *Sarsfield v Witherley* (1689) 1 Show 125, Holt 112; *Cramlington v Evans* (1689) 1 Show 4, 2 Show 509, 2 Vent 307, Holt 108; *Carter v Downish* (1689) 1 Show 127, Ex Ch; *Williams v Williams* (1693) Carth 269, 3 Salk 68. See further PARA 664 post.

12 *R v Richards* (1542) Bro Abr, Customes, pl 59; Bro NC 56; Dyer 54; *Anon* (1668) Hard 485 at 486 per Hale CB; *Pinkney v Hall* (1697) 1 Ld Raym 175; *Bromwich v Loyd* (1698) 2 Lut 1582 at 1585 per Treby CJ; *Ereskine v Murray* (1758) 2 Ld Raym 1542; and see PARA 664 post.

13 It is still possible in theory for a mercantile usage to be established as a local custom. See *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 at 443, PC, where, however, Lord Devlin omitted to mention the requirement of immemorial user and was therefore probably referring to a local usage rather than a custom having the force of law.

14 Eg the so-called 'law merchant': see PARA 664 post.

15 As to trade usage see PARA 650 et seq post.

16 Eg *Ashurst v Noell* (1663) Cambridge University Library MS Add 9430, f 526 (custom used between London and France; copy of declaration 'perused by Mr Allen et simile per Willelmum Jones'); *Claxton v Swift* (1686) 1 Lut 878, 3 Mod Rep 86; *Death v Serwonters* (1686) 1 Lut 885, Ex Ch (custom used between London and Venice that the acceptor of a bill is liable to the indorsee); *Mogadara v Holt* (1691) 1 Show 317 (custom used between London and Rotterdam). There are other examples in Vidian's *Entries* pp 30-31, 33-34, 70; and cf *Buller v Cripps* (1703) 6 Mod Rep 29 per Holt CJ. Bilocal customs were at one time commonly alleged in actions on bills of exchange and, since they had the effect of imposing non-contractual liabilities before negotiability was accepted as part of the common law, they are examples of custom in the strict sense rather than trade usage; however, when the negotiability of bills came to be regarded as a universal rule (see PARA 664 post), it became unnecessary to plead or prove a local custom (see *Mogadara v Holt* supra especially at 318 per Eyre J).

17 See PARA 616 note 30 post. It is otherwise in respect of usage: see PARA 652 text and note 7 post.

UPDATE

602 Custom as local law

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 9--1990 Act s 62(2) repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(2) CUSTOM, PRESCRIPTION AND LOCAL USAGE COMPARED/603. Similarity of custom and prescription.

(2) CUSTOM, PRESCRIPTION AND LOCAL USAGE COMPARED

603. Similarity of custom and prescription.

Custom and prescription as modes of claiming rights are in many respects closely analogous; possession or user and the passage of time are inseparable incidents to both; and in each case the possession must be long, continual, and peaceable[1].

Liberties and franchises may also be claimed by immemorial usage, and in old charters are sometimes mentioned together with customs[2]. However, a custom is distinguished from a franchise in that a franchise lies in grant, whereas a custom runs contrary to the common law and therefore cannot be derived from a Crown grant[3]. A custom, on the other hand, may not derogate from the royal prerogative in the way that a franchise necessarily does[4].

1 Co Litt 113b. See also *Rowles v Mason* (1612) 2 Brownl 192 at 198 per Coke CJ ('Prescription and custom are brothers and ought to have the same age, and reason ought to be the father and congruence the mother, and use the nurse, and time out of memory to fortify them both'); *Warrick v Queen's College, Oxford* (1870) LR 10 Eq 105 at 121-122 per Lord Romilly MR; affd (1871) 6 Ch App 716. See also *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J; affd [1905] 2 Ch 538, CA; *Egerton v Harding* [1975] QB 62 at 70, [1974] 3 All ER 689 at 693-694, CA, per Scarman LJ. See further EASEMENTS AND PROFITS A PRENDRE.

2 See also Magna Carta 1297 c 9 (still in force), confirming the customs and liberties of London and other towns.

3 Hervey's reading on Magna Carta c 9, 113 Selden Soc 7; anonymous readings on Magna Carta c 9, 113 Selden Soc 11-12; *Tanistry Case* (1608) Dav Ir 28 at 32 (custom cannot derive from king's grant). Cf *Fulwood's Case* (1591) 4 Co Rep 64b at 65a; and *Byrd v Wilford* (1596) Cro Eliz 464, where it is held that the Chamberlain of London is a customary corporation sole (see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1128); but it may be better to regard the office as a corporation by prescription.

4 See PARA 601 note 10 ante. It was not necessary to claim a custom, in the true sense, when franchises were claimed in quo warranto: see Eyre of Kent (1313) 24 Selden Soc 50; Eyre of London (1321) 85 Selden Soc lxiii, 15; Spelman's reading on Quo Warranto (1519) 113 Selden Soc 77. For an unsuccessful attempt to qualify a franchise by local custom see *R v Abbot of Selby* (1329) 97 Selden Soc 137.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(2) CUSTOM, PRESCRIPTION AND LOCAL USAGE COMPARED/604. Distinction between custom and prescription.

604. Distinction between custom and prescription.

The chief point of difference between prescription and custom is that a claim by prescription is personal, in that it is always made in the name of a certain person and his ancestors or those whose estate he has, or in the name of a body corporate and its predecessors, whereas custom is local, in that it is not attached to any particular persons but to a particular locality and affects an indeterminate number of persons for the time being connected with or being members of a particular class in that locality[1]. A claim by custom is, therefore, often available for those who cannot prescribe in their own name or in the name of any certain person[2]. Similarly, a duty to fence land against a common may arise by custom, where the circumstances are such that the

duty could not arise by virtue of an easement[3]. A second point of difference is that prescription can only be made in something which could have had a lawful origin by grant, whereas custom being contrary to common law is incapable of originating by grant[4].

The term 'prescription' has sometimes been used in a sense embracing all titles to incorporeal hereditaments and rights on another's land based upon a long usage[5]. This broader use of the word includes title under a custom as well as title by prescription in its strict sense.

1 *Anon* (1554) Bro NC 153; Co Litt 113b; *Foiston v Crachroode* (1587) 4 Co Rep 31b at 32a; *Rowles v Mason* (1612) 2 Brownl 192 at 198 per Coke CJ; *Jenkins v Vivian* (1626) Poph 201; *Linn-Regis Corpn v Taylor* (1684) 3 Lev 160; *Weekly v Wildman* (1698) 1 Ld Raym 405 at 406 per Wright sjt; *Beau v Bloom* (1773) 3 Wils 456; *Clarkson v Woodhouse* (1782) 5 Term Rep 412n at 414n per Lord Mansfield CJ; *R v Ecclesfield Inhabitants* (1818) 1 B & Ald 348 at 357 per Lord Ellenborough CJ. See also *Champneys v Buchan* (1857) 4 Drew 104 at 109; *Austin v Amhurst* (1877) 7 ChD 689 at 692 per Fry LJ; *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J; affd [1905] 2 Ch 538, CA.

2 *Anon* (1554) Bro NC 153; *Foiston v Crachroode* (1587) 4 Co Rep 31b at 32a. 'Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there; or if he prescribes in a que estate, it must be under cover of the tenant in fee': *Bean v Bloom* (1773) 2 Wm Bl 926 at 927; and see *Derry v Sanders* [1919] 1 KB 223 at 237, CA.

3 *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA. As to the easement of fencing see EASEMENTS AND PROFITS A PRENDRE. In *Egerton v Harding* supra the Court of Appeal held that the court of first instance was justified in finding that the duty to fence was based on custom, but that it was not necessary to make such a finding because once an immemorial usage of fencing as a matter of obligation was established, a lawful origin of the usage was to be presumed, provided that a lawful origin was possible; cf *London and North Western Rly Co v Fobbing Levels Comrs* (1896) 75 LT 629 cited in para 616 note 7 post.

4 See PARAS 620 note 6, 629 note 3 post.

5 See eg *Lockwood v Wood* (1844) 6 QB 50 at 66, 67, Ex Ch, per Tindal CJ; and see PARAS 629-632 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(2) CUSTOM, PRESCRIPTION AND LOCAL USAGE COMPARED/605. Distinction between custom and usage.

605. Distinction between custom and usage.

Immemorial local customs are clearly distinguishable from particular trade or local usages which fluctuate with time, although in practice they are frequently confused with them[1]. The latter do not have the force of law, but may bind particular persons if they have been imported as express or implied terms into commercial or other contracts[2]. They lack three of the distinguishing features of customs properly so called. First, they need not have existed from time immemorial[3]. Secondly, they need not necessarily be confined to a limited locality[4], though they may in fact be thus confined, as in the case of agricultural usages[5]. Thirdly, usages, however extensive, if contrary to positive law will not be sanctioned by the courts[6], while customs are by their nature inconsistent with the general law of the realm[7].

1 See PARA 650 et seq post. As to particular trade or local usages see PARA 687 et seq post. As to the distinction between custom and usage see also PARAS 601 ante, 651 post.

2 *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA, per Kay LJ; *Sewell v Corp* (1824) 1 C & P 392 at 393 per Best CJ; and see PARA 651 post.

3 See PARA 656 post.

4 See PARA 652 post.

5 See PARA 691 post.

6 See PARA 661 post.

7 See PARAS 601 ante, 612 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(i) In general/606. Essential attributes.

(3) ESSENTIAL CHARACTERISTICS OF CUSTOM

(i) In general

606. Essential attributes.

To be valid, a custom must have four essential attributes[1]: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms, and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to affect; and (4) it must have continued as of right[2] and without interruption since its immemorial origin. These characteristics serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted[3].

1 *Tanistry Case* (1608) Dav Ir 28 at 32; *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch, per Tindal CJ; *Mercer v Denne* [1904] 2 Ch 534 at 551 per Farwell J; affd [1905] 2 Ch 538, CA; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 876, [1940] 3 All ER 101 at 109, HL, per Viscount Maugham (three requirements: certainty, reasonableness, and immemorial existence); *Egerton v Harding* [1975] QB 62 at 68, [1974] 3 All ER 689 at 692, CA, per Scarman LJ. See further PARAS 607-619 post.

2 See PARA 623 post.

3 *Hammerton v Honey* (1876) 24 WR 603.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(ii) Immemorial Existence/607. Presumption of immemorial existence.

(ii) Immemorial Existence

607. Presumption of immemorial existence.

Every custom must have been in existence from a time preceding the memory of man[1], a date which has long been fixed for legal purposes at the year 1189, the commencement of the reign of Richard I[2]. Where, however, it is impossible to show such a continued existence, the courts will support the custom if circumstances are proved which raise a presumption that the custom existed at that date[3]. Evidence showing continuous user as of right as far back as living testimony can go is regarded as raising this presumption[4].

Again, if proof is given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred. The courts favour such an inference, and are slow to draw an inference of fact which would defeat a custom which has apparently existed for a long time[5]; for it is a maxim of the law to give effect to everything which appears to have been established for a

considerable course of time, and to presume that that which has been done was done of right and not in wrong[6]. It is convenient that every supposition not wholly irrational should be made in favour of long-continued enjoyment[7]; consequently it is a rule of law that wherever there is an immemorial custom the court must presume everything possible which could give it a legal origin[8].

1 Littleton's Tenures ss 73, 170; Co Litt 58b. 'No usage can be part of law, or have the force of a custom, that is not immemorial': *Millar v Taylor* (1769) 4 Burr 2303 at 2368 per Yates J; *London Corpn v Cox* (1867) LR 2 HL 239 at 259 per Willes J. See also 1 Bl Com (14th Edn) 76 (where it is said that to make a particular custom good it must 'have been used so long that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom'). This statement, however, requires qualification, for it is clear that it would be in no way fatal to an alleged custom were a precise origin shown prior to 1189: see PARA 621 post. See also *Payne v Ecclesiastical Comrs and Landon* (1913) 30 TLR 167.

2 *Chapman v Smith* (1754) 2 Ves Sen 506 at 510 per Lord Hardwicke LC; *Hammerton v Honey* (1876) 24 WR 603 per Jessel MR. As to how the time for the commencement of legal memory became fixed see *Angus v Dalton* (1877) 3 QBD 85 at 103-104 per Cockburn CJ. The reign of Richard I commenced on 3 September 1189.

3 *Jenkins v Harvey* (1835) 1 Cr M & R 877 at 894 per Parke B (custom for the mayor and burgesses of Truro and their lessees to exercise the office of meter, or measurer of certain goods imported by sea); *R v Joliffe* (1823) 2 B & C 54; *R v Rollett* (1875) LR 10 QB 469 at 475 per Lush J (alleged custom for a parish to be exempt from liability to repair highways); *Brocklebank v Thompson* [1903] 2 Ch 344 at 350 per Joyce J (customary churchway for the parishioners to the parish church); *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J; affd [1905] 2 Ch 538, CA (custom for fishermen inhabitants of a parish to dry their nets on the seashore); *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 519; affd [1975] Ch 380, [1975] 3 All ER 44, CA (custom to use land for sports and pastimes).

4 See PARA 622 post.

5 *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J; affd [1905] 2 Ch 538, CA.

6 *Gibson v Doeg* (1857) 2 H & N 615 at 623 per Pollock CB, cited with approval in *Heath v Deane* [1905] 2 Ch 86 at 93.

7 *Penryn Corpn v Best* (1878) 3 ExD 292 at 299, CA, per Bramwell LJ, cited with approval in *Heath v Deane* [1905] 2 Ch 86 at 93.

8 *Cocksedge v Fanshaw* (1779) 1 Doug KB 119 at 132 per Lord Mansfield CJ; *Brocklebank v Thompson* [1903] 2 Ch 344 at 350 per Joyce J; *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J; affd [1905] 2 Ch 538, CA; and see *New Windsor Corpn v Mellor* [1974] 2 All ER 510; affd [1975] Ch 380, [1975] 3 All ER 44, CA; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(ii) Immemorial Existence/608. Rebutting the presumption.

608. Rebutting the presumption.

The presumption of immemorial existence[1] is rebuttable and may be displaced in a number of ways[2], for example by any evidence which proves that the custom as alleged did not exist or could not have existed in the time of Richard I[3], or by tracing the origin of the custom to some other more recent source, as where the only acts of user proved can be shown to have been done under a revocable licence[4]. The onus, however, lies on the person seeking to disprove the custom to demonstrate its impossibility, if the existence of the custom has been proved for a long period[5], and it may not always be possible to overturn a long established custom by reliance on modern historical research suggesting the likelihood or even the near certainty that it could not have obtained in 1189[6]. It is not significant that the subject-matter may have changed its name since 1189[7].

1 See PARA 607 ante.

2 See also PARA 621 text to notes 3-5 post.

3 *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; *Bastard v Smith* (1837) 2 Mood & R 129 at 136 per Tindal CJ. The court may reach this conclusion by judicial notice in the case of an obvious anachronism: see PARA 609 note 7 post. Cf note 6 infra.

4 *Mills v Colchester Corpn* (1867) LR 2 CP 476; affd (1868) LR 3 CP 575; and see *Lockwood v Wood* (1845) 15 LJQB 36 (where the origin of the user in question was traced to a deed of 1646); *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 519 (where the words in a statute 'according to the law of ancient time used' showed that the user was not started by virtue of the statute); affd [1975] Ch 380, [1975] 3 All ER 44, CA. See also *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA (alleged custom for inhabitants of the County Palatine of Durham to go on to a strip of foreshore in order to remove sea coal; custom not proved). In this case Russell LJ at 475 and at 847 said: 'It is a well known aspect of English law that in relation to the foreshore a great many activities have been generally tolerated without giving rise to any legal right to continue them. It has never been established in English law that beachcombing can give rise to a legal right to frequent the foreshore for the purpose of beachcombing or require a presumption of a legal origin'. See further PARA 623 note 3 post; and EASEMENTS AND PROFITS A PRENDRE; WATER AND WATERWAYS vol 100 (2009) PARA 56 note 1.

5 *Mercer v Denne* [1904] 2 Ch 534 at 555 per Farwell J; affd [1905] 2 Ch 538, CA; and see *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; and PARA 627 post. Thus, in *Simpson v Wells* (1872) LR 7 QB 214, a claim of a custom to set up stalls at the statute sessions for the hiring of servants was defeated by showing that these sessions were introduced by the Statutes of Labourers, the first of which was 23 Edw 3 (Labourers, artificers, etc) (1349) (repealed).

6 Eg no historian would accept that copyhold (as later understood) existed in 1189, and yet the legal validity of copyhold customs cannot be questioned on that ground: see PARAS 627-642 post. It is now thought that the custom of tenant-right in the northern counties (as to which see PARA 643 note 1 post) originated in Tudor times: see Hoyle, 116 Past and Present 24-25 (1987). See also *Chichester v Lethbridge* (1738) Willes 71 at 73 per Willes CJ (the court will not take judicial notice that coaches and chariots did not exist in 1189, once the jury have found a custom concerning coaches and chariots to be immemorial); *Blissett v Hart* (1744) Willes 508 at 511 (same point); *Paterson v Provost of St Andrew's and James McBain* (1881) 6 App Cas 833, HL, cited in para 634 note 3 post (where golf was admitted by the pleadings to be immemorial).

7 *Cocksedge v Fanshaw* (1779) 1 Doug KB, 119 at 133 per Willes J (alleged custom concerning corn-factors not impugned by showing that corn-factors were unknown by that name in 1189); and see note 6 supra (no instance of the word 'copyhold' can be found in the twelfth or thirteenth centuries). Cf para 625 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iii) Reasonableness/609. What is meant by reasonableness.

(iii) Reasonableness

609. What is meant by reasonableness.

A custom must be reasonable, and if it is against reason it has no force in law[1]. Reason for this purpose is not to be understood as meaning every unlearned person's reason, but artificial and legal reason warranted by authority of law[2]. Consequently a custom may be good even if no particular reason for it can be assigned; it is sufficient if there is no good legal reason against it[3]. It is not for the party asserting a custom to prove its reasonableness[4]; the rule is rather that a supposed custom may be rejected if it is unreasonable.

There is no single test of unreasonableness for this purpose, and it may represent more than one notion. In some cases it may mean that the terms of the custom raise an implication that it resulted from accident or indulgence[5] or from an arbitrary use of power[6]. In other cases it may indicate a rebuttal of the presumption of immemorial user by common sense, as in the case of

a supposed custom to pay a sum of money which would have been exorbitant in 1189[7]. And sometimes it may mean that the proffered custom is not claimed with sufficient precision[8]. But customs may also be rejected on substantive grounds; for no amount of usage will validate a custom which is in law unreasonable[9]. Since customs are by definition inconsistent with the common law, they are not invalid merely because they are contrary to common law principles[10]. They are only unreasonable if they are inconsistent with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system[11], or if they are contrary to the first principles of justice[12].

1 *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860, [1940] 3 All ER 101, HL (approving *Hilton v Earl of Granville* (1844) 5 QB 701); Littleton's Tenures ss 80, 212; Co Litt 62a; 1 Bl Com (14th Edn) 77; *Tanistry Case* (1608) Dav Ir 28 at 32; *Hix v Gardiner* (1614) 2 Bulst 195; *Broadbent v Wilks* (1742) Willes 360; *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch; *London Corpn v Cox* (1867) LR 2 HL 239 at 258; *Mercer v Denne* [1904] 2 Ch 534 at 551; affd [1905] 2 Ch 538, CA; *Johnson v Clark* [1908] 1 Ch 303 at 311 per Parker J; *Sowerby v Coleman* (1867) LR 2 Exch 96; *Bastard v Smith* (1837) 2 Mood & R 129 at 136 per Tindal CJ (a question of law, not of fact); *Egerton v Harding* [1975] QB 62 at 68, [1974] 3 All ER 689 at 692, CA, per Scarman LJ.

2 Co Litt 62a; *Johnson v Clark* [1908] 1 Ch 303 at 311 per Parker J.

3 1 Bl Com (14th Edn) 77; *Hix v Gardiner* (1614) 2 Buls 195 at 196 per Coke CJ ('you cannot imagine the reason of a custom ... if no reason can be given, for the beginning of this, or of any other custom, yet non sequitur, this custom to be for this cause unreasonable, and against reason in the beginning of it'). See also PARA 620 post.

4 It was the usual form of pleading at common law to assert that a custom was 'an ancient and laudable custom used and approved'; but this does not seem to have been treated as a positive averment of reasonableness, which (being a question of law) was not an issuable fact. The form is still found in *Mercer v Denne* [1904] 2 Ch 534. In canon law, a 'laudable' custom was any custom which was not contrary to the faith or to divine law or contra bonos mores: Lyndwood, Provinciale (1679 Edn) 22 gl Consuetudini laudabili, 199 gl Consuetudini locorum. And an 'approved' custom was one which met the requirements for validity, namely that it be both reasonable and immemorial: ibid 253 gl Approbatas.

5 *Marquis of Salisbury v Gladstone* (1861) 9 HL Cas 692 at 701 per Lord Cranworth LC; *Johnson v Clark* [1908] 1 Ch 303 at 309 per Parker J; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833 at 839, CA.

6 *Wilkes v Broadbent* (1745) 2 Stra 1224.

7 *Traherne v Gardner* (1856) 5 E & B 913 at 940; *Bryant v Foot* (1868) LR 3 QB 497, Ex Ch; and see PARA 627 note 2 post. Customs may, however, be modified in their operation over time: see PARA 625 post. The difficulty in *Bryant v Foot* supra may be avoided by pleading a custom to take a reasonable fee: see PARA 625 note 7 post.

8 Eg an alleged custom of Devonshire for the inhabitants of a city or great town to pull down houses 'near to' a burning house, to save other houses, was held unreasonable and invalid, because although it was reasonable to allow adjacent houses to be pulled down (cf para 613 note 3 post) it was not right to extend this by the vague word 'near': *Daymonde v Greenwood* (1602) Coventry's reports, Brit Lib MS Add 25203, f 600v. A supposed custom for the lord of a manor working a coal pit to throw earth and coals on land 'near' the pit was rejected partly on the same ground: *Wilkes v Broadbent* (1745) 1 Wils 63, 2 Stra 1224. See further PARAS 614-617 post.

9 *R v Chanceux* (1329) 97 Selden Soc 61 at 62 per Scrope CJ ('The law will not allow any usage that is to the common damage of the people. The longer such a usage has been maintained the greater is the wrong . . .'); *Tanistry Case* (1608) Dav Ir 28 at 32; *Hammerton v Honey* (1876) 24 WR 603 per Jessel MR; *Johnson v Clark* [1908] 1 Ch 303 at 311 per Parker J.

10 *R v Abbot of Selby* (1329) 97 Selden Soc 137 per Shareshill sjt; YB Pas 39 Edw 3, f 10 per Belknap CJ ('Though a usage is used contrary to the course of common law and right, if it may stand with reason it is good that it should be allowed'); *Grimesby's Case* (1456) YB Mich 35 Hen 6, f 25, pl 33, at f 29a per Prisot CJ; Co Litt 113a; *Tanistry Case* (1608) Dav Ir 28; *Horton v Beckman* (1796) 6 TR 760 at 764 per Lord Kenyon CJ ('it is of the very essence of a custom that it should vary from' the common law); *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch.

11 *Johnson v Clark* [1908] 1 Ch 303 at 311 per Parker J. Cf Serjeant Herle's test in *R v City of London* (1321) 85 Selden Soc 20, that a custom should not be so contrary to the common law that it undoes the law ('usage qe est hors de comune dreit qe deit estre alowe contrarie a lei ne deit mie estre si contrarie qil deface la lei').

12 1 Wms Saund 67 note (1); *Fisher v Lane* (1777) 3 Wils 298. Cf *R v Gisors* (1321) 85 Selden Soc 67 (alleged custom to bail prisoners for felony until the next eyre, held bad because, eyres having become rare, it delayed justice); *Tanistry Case* (1608) Dav Ir 28 at 32 (a custom is void if repugnant to the law of reason, which is above all positive laws); *Lewis v Masters* (1695) 5 Mod Rep 75 per Holt CJ ('It is one thing if a custom be different from the law, and another thing if it be repugnant to it and unreasonable').

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iii) Reasonableness/610. Reasonableness at time of inception.

610. Reasonableness at time of inception.

The period for ascertaining whether a particular custom is reasonable or not is its inception[1]. If a custom is held to have been reasonable at its inception, it is no objection that it may at times have been used in an unreasonable manner[2] or that it has subsequently become less reasonable[3]. The courts have sometimes rejected customs on the ground that they cannot have had a reasonable or lawful commencement[4]; but the origin of a custom is of no concern to the courts, being beyond legal memory[5], and this is merely a rhetorical way of saying that such customs are inherently unreasonable.

1 *Mercer v Denne* [1904] 2 Ch 534 at 557 per Farwell J; affd [1905] 2 Ch 538, CA.

2 *Mercer v Denne* [1904] 2 Ch 534 at 557 per Farwell J; affd [1905] 2 Ch 538, CA (see dictum at 584 per Cozens-Hardy LJ, that a custom must be exercised reasonably).

3 2 Co Inst 664 ('a custome once reasonable and tolerable, if after it become grievous, and not answerable to the reason whereupon it was grounded, yet is to be ... taken away by act of parliament').

4 *Tanistry Case* (1608) Dav Ir 28 at 32, 33; *Paramore v Verall* (1599) 2 And 151 at 152; *Tyson v Smith* (1838) 9 Ad & El 406 at 421-422, Ex Ch, per Tindal CJ.

5 See PARA 620 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iii) Reasonableness/611. Unfairness.

611. Unfairness.

A custom may be held unreasonable on the grounds that it is unfair or potentially unfair. Thus, a custom allowing a local court or official to proceed contrary to the principles of natural justice is void[1]. So is a custom which might operate unequally, so as to prejudice particular individuals more than others[2]. Likewise a custom which subjects a multitude to the whim of an individual[3], or which benefits an individual to the prejudice of the multitude[4]. And customs have been held void if they deprive favoured persons, such as minors, of the kind of protection given to them by the common law against the consequences of undue influence or folly[5].

1 Littleton's Tenures s 212; *Devered v Ratcliffe* (1590) Cro Eliz 885; *Day v Savadge* (1614) Hob 85 at 87; *Collins v Page* (1648) Style 124; 1 Wms Saund 67 note (1); *City of London v Clerk* (1677) 3 Keb 811; *Fisher v Lane* (1772) 3 Wils 298; *London Corpn v Cox* (1867) LR 2 HL 239 at 266, 294. Most surviving local courts were abolished by the Administration of Justice Act 1977 s 23, Sch 4: see PARA 699 post.

2 Eg *Barker v Cocker* (1620) Hob 329 (alleged custom for the rector of a parish to take every tenth lamb born in the parish, without regard to ownership, held bad because a man who owned only one lamb might lose it, whereas another man might lose nothing at all).

3 *Anon* (1369) YB Mich 43 Edw 3, f 32, pl 30 (alleged custom for lord to re-enter upon tenants for non-payment of rent until an agreement is reached, held a bad usage 'to deprive a man of his inheritance'); *Milles v Benet* (1401) YB Trin 2 Hen 4, f 24, pl 20 (alleged custom that tenants should not put beasts in the common before the lord, held void, because the lord might not put his beasts in at all and thereby bar all the commoners); YB Pas 21 Edw 4, f 28, pl 23 per Littleton J. So, conversely, a custom which subjects an individual to the whim of a multitude: *Lady Wilson v Willes* (1806) 7 East 121 (custom for tenants to take turves from the manorial waste to repair and improve their grass plots, held void, because 'there is no limitation to the custom, as laid, but caprice and fancy'). See also *Rogers v Brenton* (1847) 10 QB 26 (claim by tin bounders in Cornwall to retain claims by merely renewing the boundary posts, without working the tin, held to be unreasonable).

4 *R v Chanceux* (1329) 97 Selden Soc 61 at 62 per Scrope CJ ('The law will not allow any usage that is to the common damage of the people'); *Tanistry Case* (1608) Dav Ir 28 at 32 ('a custom which is contrary to the public weal, which is the scope and general end of all laws (*salus populi suprema lex*) and injurious and prejudicial to the multitude, and beneficial only to some particular person, such custom is repugnant to the law of reason ... and no prescription of time can make it good'); 1 Rolle Abr 559, Custome (E) 6.

5 *Oxenford v Clerk* (1363) YB 37 Edw 3, Lib Ass, pl 5; 1 Rolle Abr 567, Custome (F) 1; *Anon* (1581) Dyer's circuit reports in 110 Selden Soc 465, pl 242 (alleged custom of duchy of Lancaster enabling married woman to devise land to her husband, held bad); *Lechford's Case* (1610) 8 Co Rep 100; *Needler v Bishop of Winchester* (1614) Hob 220 at 225 (a custom enabling a married woman to convey land without a separate examination would be bad); *Johnson v Clark* [1908] 1 Ch 303 (alleged custom of burgage tenure enabling married women to convey land without examination and acknowledgment, held void). In several towns it was said to be the custom that an infant (a minor) could alienate land as soon as he could count, or measure cloth: *Anon* (1292) YB 20 Edw 1 (Rolls Ser) 220; *FitzGerard v Le Cu* (1304) YB 32 & 33 Edw 1 (Rolls Ser) 511 (custom of Ipswich confessed); Trin 19 Edw 2, Fitz Abr, Gard, pl 127 (custom of Ipswich); *Anon* (1339) YB Pas 13 Edw 3 (Rolls Ser) 237 (custom of Gloucester held bad as pleaded, but only because the party did not plead the age of the infant in question); YB Mich 11 Hen 4, f 30, pl 55 per Hankford J. But these are considered unreasonable: *Anon* (1581) supra (as to infants under the age of discretion); *Needler v Bishop of Winchester* supra at 225 ('for custom must not deprive the law of nature'); *Johnson v Clark* supra at 311 per Parker J; cf 1 Rolle Abr 565, Custome (A) 3 (bad because uncertain). The precise age of majority, for infants above the age of discretion, might nevertheless vary according to local custom. It was commonly 15: *Torald v Copper* (1311) YB Mich 5 Edw 2 (63 Selden Soc) 61 (borough English in Nottingham); YB Mich 11 Hen 4, f 33, pl 60 (gavelkind); YB Mich 37 Hen 6, f 5, pl 9 (unnamed vill); cf YB Pas 21 Edw 4, f 24, pl 10 (the gavelkind custom held not to extend to wills). This custom survived in the case of gavelkind and borough English until 1925. The age of majority is now universally fixed at 18 years: see the Family Law Reform Act 1969 s 1(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iii) Reasonableness/612. Confiscation or destruction of property, or injury to the person.

612. Confiscation or destruction of property, or injury to the person.

A custom is unreasonable if it would result in a forfeiture of goods or money without any reasonable recompense or consideration[1]. So is a custom which would have the effect of destroying or removing property, or rendering it unusable, without consideration[2]; and for this reason a right in the nature of a profit à prendre cannot normally be acquired by custom[3]. A fortiori, a custom whereby someone might be imprisoned without reasonable cause would be unreasonable[4], and customs purporting to permit imprisonment without due process have sometimes been rejected[5]. A custom to beat a trespasser without stint would be wholly against reason[6]. Legal restraints on the enjoyment of property[7], or customs in restraint of trade[8], may be equally objectionable.

1 *Grimesby's Case* (1456) YB Mich 35 Hen 6, f 25, pl 33 (alleged custom of London for pawnee to detain goods even if they belong to a third party, held bad; a decision approved by Lee CJ in *Hartop v Hoare* (1743) 3 Atk 44 at 53); *Henley v Taylor* (1559) Moore KB 16; *Parton v Mason* (1561) Dyer 199; *Wilson v Wise* (1561)

Moore KB 16; *Parker v Combleford* (1599) Cro Eliz 725 (alleged custom to take the beast of a stranger as heriot, held unreasonable and void); *Geere v Burkensham* (1682) 3 Lev 85 (alleged custom for the lord of a manor to take the best anchor and cable of a ship thrown on to his land, held void 'and without consideration'); *Coriton and Harvey v Lithby* (1670) 1 Vent 167 (alleged custom for the tenants of a manor to grind all the corn spent in their houses rejected because all corn does not require grinding before being spent); *Taylor v Scott* (1729) Fitz-G 55, sub nom *Naylor v Scott* 2 Ld Raym 1558 (alleged custom for every inhabitant having a child born in a parish to pay a churching fee, whether or not the mother was churched, held bad); *Richards v Dovey* (1746) Willes 622 (alleged custom for parishioner who marries in another parish to pay 5 shillings to the rector of the first parish, held void). As to consideration in this context see PARA 613 post.

2 *Wilkes v Broadbent* (1745) 1 Wils 63, 2 Stra 1224; *Badger v Ford* (1819) 3 B & Ald 153 (alleged custom for lord of manor to lease waste without restriction, held bad, because it would destroy the rights of the commoners; but cf *Ramsey v Cruddas* [1893] 1 QB 228); *Arlett v Ellis and Shefford* (1827) 7 B & C 346 (alleged custom for lord of manor to inclose waste without restriction, held bad for the same reason); *Blackett v Bradley* (1862) 1 B & S 940 (alleged custom to mine under the manorial waste without paying compensation for subsidence, held bad); *Wakefield v Duke of Buccleuch* (1867) LR 4 Eq 613 at 650; on appeal sub nom *Duke of Buccleuch v Wakefield* (1870) LR 4 HL 377 at 399 (supposed custom to let down the surface in mining operations without paying compensation to surface owner, held bad); *Davis v Treharne* (1881) 6 App Cas 460 at 464, HL, per Lord Selborne LC (there cannot be a custom to let down the surface in mining, as against either the lessor of the mine or a stranger); *Lancashire v Hunt* (1894) 10 TLR 448 (alleged custom to train unlimited number of racehorses on another's land, held bad), affd without reference to this point 11 TLR 49, CA; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860, [1940] 3 All ER 101, HL (alleged custom of mining which caused subsidence and damage to neighbouring land and buildings was held to be unreasonable, following *Hilton v Earl of Granville* (1844) 5 QB 701); *Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808 at 840, [1967] 2 All ER 472 at 490 per Megaw J (supposed custom for the world at large to moor boats, without stint, cannot be a valid custom because it would be potentially self-destructive). As to mining customs see also PARA 644 post. On the same principle, a custom may not permit a tenant for life to waste the inheritance: see PARA 642 note 19 post. See also PARA 632 post. As to the statutory restrictions on the creation of a strict settlement on or after 1 January 1997 see PARA 642 note 19 post.

3 See PARA 631 note 2 post. The principle does not apply in the case of former copyhold land: see PARA 642 note 17 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq. Another exception is where the customary claim can be coupled with a prescription, by way of enlargement: *Stile v Burt* (1595) 1 Rolle Abr 567, Custome (G) 3 (commoners claimed customary right to dig clay in the common for the repair of houses); *Bean v Bloom* (1774) 2 Wm Bla 926, sub nom *Beau v Bloom* 3 Wils 456 (where a party had a prescriptive right of common, he could allege a local custom for the commoners to cut rushes).

4 *Paramore v Verall* (1559) 2 And 151 (supposed custom to arrest any citizen of London for the debts of a fellow citizen, held to be unreasonable and void).

5 Eg YB Hil 22 Edw 4, f 43, pl 4 per Bryan CJ (alleged custom for mayor to imprison for three days); *Waldyeve v Woodshawe* (1523) CP 40/1040, m 458 (alleged custom of Tamworth to arrest for affray, held bad on demurrer); *Vowell v Hurste* (1526) CP 40/1052, m 728 (alleged custom of Exeter for mayor and bailiffs to imprison those suspected of keeping a bawdy house; undetermined demurrer); *Simmons v Sweate* (1587) Cro Eliz 78; *Dean's Case* (1600) Cro Eliz 689 (alleged custom of London to commit out of court for private contempt of an alderman, held bad); *City of London v Clerk* (1677) 3 Keb 811, 1 Vent 327.

6 *Grimesby's Case* (1456) YB Mich 35 Hen 6, f 25, pl 33 per Littleton J.

7 Thus an alleged town custom that a socage tenant in fee simple should not lease beyond six years was held to be 'against common reason and the freedom of estate of one who hath fee simple': *Salforde's Case* (1577) Dyer 357b.

8 See *Winton Corpn v Wilks* (1706) 2 Ld Raym 1129. Customs in restraint of trade were allowed in the City of London: see PARA 628 note 22 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iii) Reasonableness/613. Effect of a consideration.

613. Effect of a consideration.

A custom which might otherwise be held unreasonable on the ground that it would prejudice or benefit some individuals more than others may nevertheless be upheld if there is some

consideration or quid pro quo to compensate for the prejudice or to merit the benefit[1]. The consideration may be public or private[2]. A public consideration may be provided by a benefit conferred on the community at large[3]. Thus a custom for dealing with an emergency[4] or nuisance[5] at the expense of private property may be justified by the public benefit. A private consideration likewise may support a custom, as where the custom requires compensation to be paid for damage to property or inconvenience caused[6] or some benefit is received in return for a customary due[7]. The consideration, to be reasonable, must be proportionable to the benefit or detriment[8]. The tenure of land may also be deemed a consideration for either the lord or his tenants to have benefits at the expense of the other[9]. So likewise may residence in the locality be a consideration for local dues and burdens of various kinds[10].

1 *Cudden v Estwick* (1704) 6 Mod Rep 123 at 124 per Holt CJ ('the reasons by which a custom is supported are generally these: First, because the party bound by it has some benefit by it. Secondly, that the party who claims the advantage of it is at some charge by reason of it ... '). Cf *Millechamp v Johnson* (1746) Willes 205n, where an alleged custom for the inhabitants of a parish to play games on the plaintiff's close was objected to for want of consideration, but the objection was overruled.

2 *Wilkes v Broadbent* (1745) 2 Stra 1224 at 1225 per Lee CJ. Cf *Simpson v Bithwood* (1691) 3 Lev 307 (customs to do things for the public good require no consideration).

3 Eg the custom of mill-suit, requiring inhabitants to use the lord's mill only for grinding their grain, was supported by the consideration of providing the mill: *Hix v Gardiner* (1614) 2 Bulst 195; *Harbin v Green* (1616) Hob 189 ('both sides are bound by the custom, the one to bring his corn to grind there, and not elsewhere, the other to maintain his mills and all provision for grinding'); *Walmesley v Marshall* (1628) cit 4 Madd 105n; *Green v Robinson* (1660) Hard 174; *Drake v Wiglesworth* (1752) Willes 654 at 657 per Willes CJ ('there must be a mutual consideration'); *Cort v Birkbeck* (1779) 1 Doug KB 218; *Gard v Callard* (1817) 6 M & S 69; *Duke of Norfolk v Myers* (1819) 4 Madd 83; but cf *Ord v Buck* (1797) 8 Bro PC 106, HL; *Richardson v Walker* (1824) 2 B & C 827 (custom does not prevent tenants buying flour milled elsewhere). Or the custom that the rector of a parish should keep a bull and a boar for the common use of the kine and sows of the parishioners, which was supported by the consideration of the tithes: *Yielding v Fay* (1594) Cro Eliz 569; *Anon* (1597) 1 Rolle Abr 559, Custome (E) 3 ('for it is grounded upon a good consideration'); *Waples v Bassett* (1698) 4 Mod Rep 241, Skin 399; *Lanchbury v Bode* [1898] 2 Ch 120. See also *Tofft v Tay* (1502) KB 27/963, m 38 (demurrer to evidence of a custom of Essex for the county gaoler to charge a fee); *Hill v Hawkur* (1614) Moore KB 835 (custom whereby the town crier was entitled to a toll on grain held reasonable in consideration of his duty of keeping the market clean); *Hill v Hanks* (1614) 2 Bulst 201, sub nom *Hill v Hawkes* 1 Rolle Abr 561(G) 1 (custom for a bellman employed by an ancient corporation to sweep the streets and market, to take by way of remuneration a share of every sack opened in the market for sale); *Napper v Mansell* (1622) cited in *Hill v Bunning* (1660) Sid 17 at 18 (custom for a corporation of a town to have so much per ton for every incoming vessel); *Smith v Barrett* (1663) 1 Sid 161 (custom for burgesses to take buckets of salt in recompense for their charge in maintaining boileries); *Vaughan v Atwood* (1675) 1 Mod Rep 202, 2 Mod Rep 56 (custom for homage of a manor to destroy corrupt victuals exposed for sale, held good 'to prevent evil'); *Linn-Regis Corpn v Taylor* (1684) 3 Lev 160 (custom for freemen and shipowners to dig for ballast in the shore, held good 'being for the maintenance of navigation and pro bono publico'); *Simpson v Bithwood* (1691) 3 Lev 307 (custom for the lord of a manor to take the anchor and cable of ships cast on his land, in consideration of burying the dead or caring for survivors); *Vinkinstone v Ebden* (1698) Carth 357, 1 Ld Raym 384 (custom for corporation of Newcastle to take a toll of fivepence per chaldron of coals shipped off, held good in consideration of their maintaining the port); *Wigglesworth v Dallison* (1799) Doug 201 (custom for lessee for years to take away-going crop, held good 'for the benefit and economy of agriculture'); *Jones v Waters* (1835) 1 Cr M & R 713 (custom for the town crier to have the exclusive right of proclaiming auction sales by sound of bell, held good because the office of town crier must have been of considerable convenience to the public before printing); *Tyson v Smith* (1838) 9 Ad & El 406, Ex Ch (custom within a certain area for every victualler to enter on land when a fair was being held on certain days in the year, and to erect a booth or stall, and for this privilege to pay the owner the sum of twopence when lawfully demanded); *Elwood v Bullock* (1844) 6 QB 383 (custom for victuallers to erect booths in a highway during a fair, leaving sufficient room for the passage of horses and carts, and paying compensation to the owner of the soil, held good because the existence of a fair is a matter of public convenience); *Rogers v Brenton* (1847) 10 QB 26 at 58 per Lord Denman CJ (custom of tin bounding in Cornwall held reasonable only because of the payment of toll and 'the benefit to the public secured thereby in the extraction of the mineral from the bowels of the earth'); *Mercer v Denne* [1905] 2 Ch 538, CA (custom for the inhabitants of a parish carrying on the trade or business of fishermen to use a piece of land covered with shingle to spread and dry their nets upon it, 'in favour of fishing and navigation').

4 Eg pulling down houses adjacent to one which has caught fire, to prevent the spread of fire to others: *Harecourt v Spycer* (1521) YB Trin 13 Hen 8, f 16, pl 1 per Shelley sjt; *Malyverer v Spynke* (1537) Dyer 36b. Or making bulwarks on the ground of another for the defence of the realm: YB Mich 8 Edw 4, f 23, pl 41 (though questioned here whether it was not common law). These customs are recognised in *Cuny v Brugewode* (1506)

YB Trin 21 Hen 7, f 27, pl 5 per Kingsmill J ('these are things justifiable and lawful for maintenance of the common weal'); *Malyverer v Spynke* (1537) Dyer 36b; *Tanistry Case* (1608) Dav Ir 28 at 32; *Pain v Patrick* (1690) 3 Mod Rep 289 at 294; *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch; *Race v Ward* (1855) 4 E & B 702 at 710; and *Mercer v Denne* [1905] 2 Ch 538, CA.

5 *Prior of St Gregory's, Canterbury v Thomas* (1387) YB Trin 11 Ric 2 (Ames Foundation) 65, pl 18 (custom of Canterbury to kill straying pigs and give them to the poor, after due warning given to the owner to remove them; there was said to be a similar custom in London).

6 *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 872, [1940] 3 All ER 101 at 107, HL, per Viscount Maugham. See also *Rogers v Brenton* (1847) 10 QB 26 (custom by which tin bounders in Cornwall could mark out a plot on waste land, provided they dug for tin and paid a royalty to the owner of the land); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 589.

7 *London Corpn v Hunt* (1681) 3 Lev 37, Ex Ch (custom for city to take eightpence from the master of a ship for every ton of cheese brought into the port, held reasonable because 'the liberty of bringing them into port, which is a place of safety ... implies a consideration in itself'). Such cases might also be explained on grounds of a 'public' consideration.

8 *Smith v Barrett* (1663) 1 Sid 161. Since the value of money changes, it seems to be permissible to plead a custom to pay reasonable compensation, not stating the amount with certainty: *Elwood v Bullock* (1844) 6 QB 383 (custom to erect booths during a fair, paying reasonable compensation to the owner of the soil). Cf *Holland v Lancaster* (1689) 2 Vent 134 (alleged manorial custom for the lord to take a fine of a year and a half's rent of the whole land for the alienation of any part of it, held bad, since it made no provision for apportionment).

9 The law was more flexible in allowing such customs in the case of copyhold tenements than in the case of freehold: see PARA 642 post.

10 *Parker v Combleford* (1599) Cro Eliz 725 at 726 per Walmsley J; *R v Genge* (1774) Cowp 13. Some cases in this category (such as the liability to be elected to customary offices) may be explained in terms of the public consideration of effective local government; but this is a consideration affecting residents rather than others.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iii) Reasonableness/614. Reasonableness a question of law.

614. Reasonableness a question of law.

Whether or not a custom is reasonable is a question of law for the court, and not a question of fact[1]. Apart from the legal requirements, however, the court may look into the nature of the alleged custom and if it finds it greatly affecting the rights of private property it will expect and require the custom to be supported by evidence proportionally strong and convincing[2].

1 Co Litt 59b, 113a; *Rowles v Mason* (1612) 2 Brownl 192 at 194 per Winch J; *Bell v Wardell* (1740) Willes 202 at 204 per Willes CJ; *Bastard v Smith* (1837) 2 Mood & R 129 at 135. Where, however, there is a valid custom to take a reasonable sum of money, the question whether the sum of money currently taken is reasonable is a question of fact: *Laybourn v Crisp* (1838) 4 M & W 320 at 330 (question left to the jury).

2 *Bastard v Smith* (1837) 2 Mood & R 129 at 135 per Tindal CJ (referring to the function of the jury, to whom the question was left in that form)

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iv) Certainty/615. In general.

(iv) Certainty

615. In general.

A custom must be certain[1]. Not only should the custom as alleged point out clearly and certainly the principle or rule of the custom, but that principle or rule must be one which is definite and certain, so that by the application of it to each particular case it may be shown with certainty what are the rights which the custom gives in that case[2]. There must be some definite limit to the right claimed to exist under an alleged custom (1) in respect of its nature generally[3]; (2) in respect of the locality where the custom is alleged to exist; and (3) in respect of the persons alleged to be affected by it.

The evidence of user by which it is sought to prove the custom must not be too wide to support the custom as alleged[4]. Nevertheless, if an excess of user may be explained either by usurpation[5], or by the unauthorised actions of strangers to the custom[6], the excess of user will not invalidate the custom merely on the ground of uncertainty. In matters of detail, the courts will sometimes allow a seeming lack of certainty to be supplied by an implication that the terms of the custom must be taken reasonably[7]. It is also permissible for customs to operate in slightly differently ways from time to time[8].

1 *Tanistry Case* (1608) Dav Ir 28 at 33; *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch; *Taylor v Scott* (1729) Fitz-G 55; *Fryer v Johnson* (1755) 2 Wils 28; *Blewett v Tregonning* (1835) 3 Ad & El 554; *Hammerton v Honey* (1876) 24 WR 603 per Jessel MR ('When we are told that custom must be certain--that relates to the evidence of a custom. There is no such thing as law which is uncertain--the notion of law means a certain rule of some kind'); *Mercer v Denne* [1904] 2 Ch 534 at 551; affd [1905] 2 Ch 538, CA; see also *Clayton v Corby* (1843) 5 QB 415; *Broadbent v Wilks* (1742) Willes 360 at 361 per Willes CJ.

2 *Champneys v Buchan* (1857) 4 Drew 104 at 116 per Kindersley V-C; and see *Lady Wilson v Willes* (1806) 7 East 121 per Lord Ellenborough CJ.

3 Customs were held bad on this ground in the following cases: *Broadbent v Wilks* (1742) Willes 360 (for persons owning coal mines to sink pits in another's land and to lay the coals when got on the land 'near to' such pits, there to remain and continue: though this was also held to be unreasonable); *Millechamp v Johnson* (1746) Willes 205n (to play 'any rural games' on a particular close; though this cannot easily be distinguished from *Fitch v Rawling* (1795) 2 Hy Bl 393: see PARA 633 post); *Fryer v Johnson* (1755) 2 Wils 28 (to bury 'as near as possible' to ancestors); *Blewett v Tregonning* (1835) 3 Ad & El 554 (for all the inhabitants of a parish to enter a particular close at all seasonable times of the year and to collect and carry away reasonable quantities of sand drifted on to the land by the wind: though this was also open to objection as being in the nature of a profit à prendre). See also PARA 609 note 8 ante.

4 *Hammerton v Honey* (1876) 24 WR 603 at 604. See also *Farquhar v Newbury RDC* [1908] 2 Ch 586 at 589, CA (the user of a roadway was too wide to support an alleged customary churchway confined to the inhabitants of the parish); affd [1909] 1 Ch 12, CA; *Eton College v O'Brien's Amusements Ltd* (1931) Times, 21 May.

5 *Shephard v Payne* (1864) 16 CBNS 132, Ex Ch (where the alleged custom is to take a reasonable fee, evidence that the sums in fact taken have varied, and have perhaps sometimes been excessive, does not disprove the custom); *Mercer v Denne* [1904] 2 Ch 534 at 557 per Farwell J; affd [1905] 2 Ch 538, CA; *New Windsor Corpn v Mellor* [1974] 2 All ER 510; affd [1975] Ch 380, [1975] 3 All ER 44, CA.

6 See *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; but cf *Farquhar v Newbury RDC* [1909] 1 Ch 12, CA.

7 *Millechamp v Johnson* (1746) Willes 205n (as to the time); *Carlyon v Lovering* (1857) 1 H & N 784 at 800; *Hall v Nottingham* (1875) 1 Ex D 1.

8 See PARA 625 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iv) Certainty/616. Certainty as to locality.

616. Certainty as to locality.

A custom must be certain in respect of the locality where it is alleged to exist; for every custom must be local and cannot be alleged as existing throughout the whole realm[1]. Some definite limit must therefore be assigned to the area in which the custom is said to obtain[2]. This area must be defined by reference to the limits of some legally recognised administrative division[3], as for instance a county[4], a hundred[5], a forest[6], a region of marshland[7], a city[8], a town[9] or borough[10], a parish[11], a township within a parish[12], a vill[13], a hamlet[14], a liberty[15], a barony[16], an honour[17], or a manor[18]. It is disputed whether a single custom may be claimed as operating in a number of such units, even though identical customs may in fact obtain in adjacent districts[19]; but a custom may apparently be claimed in an ancient lordship such as the Duchy of Lancaster which extends throughout the realm[20].

Customs have been claimed as limited to the tenements of a particular lord within a properly defined area[21], or to the occupants of all the ancient houses within a parish or manor[22], or to different townships within the same manor[23], but they may not, except in the case of land formerly copyhold[24], be laid in a particular tenement or piece of land[25], or in part of a vill[26].

It has been said that it is not sufficient that the area where a custom is alleged to obtain is a mere geographical district, however clearly defined, for there would be no apparent reason for the existence of a separate custom affecting a district of a kind unknown to the law; but the authorities on this point do not appear to be unanimous[27].

The boundaries of the area affected by the custom may vary from time to time, provided the area is sufficiently clearly defined at any particular moment[28]. Thus the fact that the area affected is subject to variation by reason of the encroachment or receding of the sea will not invalidate an alleged custom[29].

A custom in one locality cannot relate to matters and property situate in another locality[30].

1 YB Mich 8 Edw 4, f 18, pl 30 per Littleton J; Co Litt 113b; and see PARA 602 ante.

2 *FitzSamuel v Braythe* (1312) YB Mich 6 Edw 2 (34 Selden Soc) 199, 201-202 per Bereford CJ; *Heley v Bishop* (1371) YB 45 Edw 3, Lib Ass, pl 8 (custom of soke of Winchester seemingly rejected because not laid in a city or borough); *Beresford v Bacon* (1685) 2 Lut 1317 (custom alleged 'in a certain place' held bad, 'because the custom was not alleged to be within any manor, vill, parish etc, or to be the custom of any county, hundred etc'); *Legh v Hewitt* (1803) 4 East 154 at 159 per Lord Ellenborough CJ (there must be a 'defined limit or space'); *Womersley v Dally* (1857) 26 LJ Ex 219 at 220 per Pollock CB (quoted in note 21 infra). Cf *R v Minchin-Hampton Inhabitants* (1762) 3 Burr 1308, where a 'custom of the country' is found as to timber, without objection from Lord Mansfield CJ; but this may have been a mere usage.

3 Many of the divisions of land shown in notes 4-18 infra no longer exist as separate entities for the purposes of local government administration and the extent of the area of some of them may now be difficult to establish. Nevertheless, when a new parish is created out of part of a parish where a custom obtained, it does not destroy the custom: see *Bremner v Hull* (1866) LR 1 CP 748 (custom as to the appointment of churchwardens); cf *Green v R on the Prosecution of Elliott* (1876) 1 App Cas 513, HL (where the custom of the inhabitants of a hamlet electing churchwardens ceased with the abolition of the hamlet by Act of Parliament). As to variations from time to time in the extent of a hundred see *R v Hundred of Oswestry Inhabitants* (1817) 6 M & S 361 at 365 per Holroyd J. In some cases the customs exercised over such areas will have been capable of registration under the Commons Registration Act 1965, and may be preserved in that way: see COMMONS vol 13 (2009) PARA 403. For the local government areas in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq.

4 *Anon* (1481) YB Pas 21 Edw 4, f 28b, pl 23, cited in *Beresford v Bacon* (1685) 2 Lut 1317; Co Litt 110b; *Bastard v Smith* (1837) 2 Mood & R 129 (alleged custom in Devonshire for tin miners to divert water into their mines); *Dashwood v Magniac* [1891] 3 Ch 306 (custom of Berkshire that beech trees are timber); *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA (alleged custom in County Palatine of Durham to remove sea coal from strip of foreshore). For a collection of county customs see 38 Harvard Law Rev at 483.

Customs affecting the stannaries are generally laid as customs of the relevant county: *Bastard v Smith* (1837) 2 Mood & R 129 (custom of Devonshire); *Rogers v Brenton* (1847) 10 QB 26 (custom of Cornwall). However, the stannaries, or tin-mining areas of Devon and Cornwall, were ancient administrative districts with their own courts: see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 588 et seq. Claims based on immemorial usage in the stannaries may also be framed by way of prescription in, or lost grant to, the corporation of the

tinners: *Clyfford v Pynson* (1551) CP 40/1148, m 619 (claim laid in the corporation of the stannaries of Devon of a right to dig for tin in anyone's private land; undetermined demurrer).

5 Co Litt 110b; *Anon* (1347) 1 Rolle Abr 562 (H) 2; *R v Hundred of Oswestry Inhabitants* (1817) 6 M & S 362 (customary duty to repair a bridge); *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 407, CA; affd [1911] AC 623, HL (custom of perambulation).

6 Eg the customs of the Forest of Dean: *Bolyngeham v Dyke* (1518) CP 40/1022, m 547 (alleged custom for iron-workers to sue in the county court of Gloucestershire); *Morse v James* (1738) Willes 122 (customary Mine Law Court); *Doe d Thomson v Pearce* (1812) Peake Add Cas 242 (custom as to allotment of coal pits). A custom of Ashdown Forest was mentioned in *Earl de la Warr v Miles* (1881) 17 ChD 535, though the case rested on prescription. It is said that the forest laws in general derived from royal grants or regulations which cannot be judicially noticed: *London City Sewers Comrs v Glasse* (1872) 7 Ch App 456 at 468 per Mellish LJ. However, any rights in forests which are inconsistent with the common law, and are therefore incapable of having an origin in a royal grant, must be claimed by virtue of local custom.

7 Eg *Prior of Jerusalem v Fauconer* (1227) 13 Curia Regis Rolls 70 no 313; cf *Torell v Abbot of Stratford* (1201) 2 Curia Regis Rolls 48 (law of the marsh made in the time of Henry II). For the customs of Romney Marsh, or the 'custom of marshland', which operated in the Kentish marshes, see AEB Owen, 116 Archaeologia Cantiana 93; 2 Co Inst 276. The laws and customs of Romney Marsh were incorporated into all commissions of sewers under a statute of 1427: 6 Hen 6 c 5 (repealed). See also *London and North Western Rly Co v Fobbing Levels Comrs* (1896) 75 LT 629 (custom of the Essex marshland known as Fobbing Level).

8 Magna Carta c 9 (confirmation of customs of cities); *Holme v Thornton* (1535) CP 40/1083, m 451 (custom of city of York as to distribution of personal estates); *Mounsey v Ismay* (1863) 1 H & C 729 (see note 14 infra). For customs of the city of London see PARA 628 post.

9 Co Litt 110b.

10 Magna Carta c 9 (confirmation of customs of boroughs); Co Litt 110b; *R v Joliffe* (1823) 2 B & C 54 (custom in an ancient borough for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury); *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 518-519 (custom for inhabitants of borough to use lands for sports and pastimes); affd [1975] Ch 380, [1975] 3 All ER 44, CA. A large collection of borough customs, taken from medieval custumals, is printed in Selden Soc vols 18, 21. Outside Greater London, boroughs ceased to exist as such on 1 April 1974 by virtue of the Local Government Act 1972 ss 1(9), (10), 20(6) (as originally enacted).

11 *Warner's Case* (1619) Cro Jac 532 (custom as to churchwardens); *Hall v Nottingham* (1875) 1 ExD 1 (custom for inhabitants of a parish to erect a maypole and dance); *Mercer v Denne* [1905] 2 Ch 538, CA (custom for fishermen inhabitants of a parish to spread their nets to dry on the land of a private owner on the shore); *Brocklebank v Thompson* [1903] 2 Ch 344 (custom for the inhabitants of a parish to enjoy a churchway through the demesne land of a manor); and see PARAS 637 (parochial churchways), 640 (perambulations), 645 (ecclesiastical customs generally) post. Parishes became administrative units for secular as well as ecclesiastical purposes, but it may also be possible to lay a custom in a purely ecclesiastical unit such as a diocese: eg *Ikelesham v Dene* (1229) 13 Curia Regis Rolls 372 no 1772 (alleged custom of a diocese as to jurisdiction).

12 *Race v Ward* (1855) 4 E & B 702 (custom for the inhabitants of a township to enter a private owner's close and take water from a spring). In some parishes the duty to repair highways was allocated by custom between the constituent townships: *R v Marton* (1738) And 276; *R v Bridekirk Inhabitants* (1809) 1 East 304; *R v Eardisland* (1810) 2 Camp 494; *R v Eastrington* (1836) 5 Ad & El 765; *R v Barnoldswick Inhabitants* (1843) 4 QB 499. The duty of the inhabitants of any area with respect to the maintenance of highways was abolished by the Highways Act 1959 s 38(1) (repealed): see now the Highways Act 1980; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 247.

13 *Abbot v Weekly* (1665) 1 Lev 176 (custom for the inhabitants of a vill to dance on certain land at all times of the year, at their free will and for their recreation).

14 *Mounsey v Ismay* (1863) 1 H & C 729 (custom in a hamlet and in the city of Carlisle for the freemen and citizens on a particular day of the year to enter a close and hold horse-races there); Co Litt 110b. See also *R v Mile End Inhabitants* (1649) Sty 163; *R v Hamlet of Penderryn Inhabitants* (1788) 1 TR 513.

15 *Grant v Kearney* (1823) 12 Price 773 (a claim to perambulate the boundaries of the Liberty of the Rolls, and for that purpose to pass through the kitchen garden of Lincoln's Inn).

16 Eg *Warener v Gilpyn* (1523) CP 40/1038, m 403 (custom of the barony of Kendal as to imprisonment by the steward's court). Cf *Burgh v Swafham* (1231) 14 Curia Regis Rolls 420 no 1948 (custom of the fee of the earl of Brittany found by verdict).

17 *Mayne v Cros* (1412) YB Mich 14 Hen 4, f 2, pl 6; Co Litt 110b; *Newton v Shafto* (1667) 1 Lev 172, 1 Sid 267 (honour and manor of Tynemouth).

18 Co Litt 110b; *Tyson v Smith* (1838) 9 Ad & El 406, Ex Ch (custom for victuallers to enter a part of the waste of a manor to be indicated by the lord, and to erect booths during the times of fairs); *Marquis of Anglesey v Lord Hatherton* (1842) 10 M & W 218 (declaration of manorial custom); *Lord Chesterfield v Harris* [1911] AC 623, HL (custom as to perambulation); *Derry v Sanders* [1919] 1 KB 223, CA; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA; and see generally paras 641-644 post.

19 *Edwards v Jenkins* [1896] 1 Ch 308 (doubted whether a custom may be claimed in three parishes; but part of the objection was that it was only to be exercised in one of them), questioned on this point in *New Windsor Corpn v Mellor* [1975] Ch 380, [1975] 3 All ER 44, CA; and see Jenkins in 31 LJ (newspaper) 528. In *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139, a custom was alleged for the inhabitants of several manors to shoot wild fowl on another's land. Cf YB Pas 22 Edw 4, f 8, pl 24, where Bryan CJ refers to a custom subsisting 'in every county that I know of' except Norfolk; but this seems to refer merely to coincidence rather than to the manner of claiming such a custom. Customs regulating the distribution of personalty on intestacy were common throughout many counties, but in actions de rationabili parte bonorum they were always laid in the one county where the suit arose: eg *Rigge v Burgham* (1443) CP 40/730, m 416 (Westmorland); *Scotsald v Dutton* (1448) CP 40/750, m 559 (Yorkshire); *Kayser's Case* (1465) 109 Selden Soc 108 (Kent); *Holme v Thornton* (1535) CP 40/1083, m 451 (city of York); *Yerd v Holwaye* (1537) CP 40/1095, m 535 (Devon); Rastell, Entries (3rd Edn) 541b (Sussex). And note *Duke of Somerset v France* (1725) 1 Stra 659, where the custom of tenant-right was said to obtain in the three counties of Cumberland, Westmorland, and Northumberland, but was laid in pleading as the custom of a manor.

20 Eg *Anon* (1581) Dyer's reports in 110 Selden Soc 465 (and cf p 221).

21 Eg *Hakebeche v Hakebeche* (1309) YB Mich 3 Edw 2 (19 Selden Soc) 97 (inheritance custom in the Bishop of Ely's fee in Emneth, Norfolk); *Hamstede v Abbot of Abingdon* (1319) YB Hil 12 Edw 2 (70 Selden Soc) 11 (custom for residents of the tenure of portmote land in a particular vill); *Lodelowe v Borrey* (1319) YB Hil 12 Edw 2 (70 Selden Soc) 76 (inheritance custom in the tenure of 'Hokeday' in Shrewsbury); YB 25 Edw 3, Lib Ass, pl 11; YB 40 Edw 3, Lib Ass, pl 27 (see note 24 infra). Cf *Womersley v Dally* (1857) 26 LJ Ex 219 at 220 per Pollock CB ('the law takes cognisance of the divisions of the country into counties and parishes, but not into properties or estates, which are purely private in their nature').

22 Eg *Pain v Patrick* (1690) 3 Mod Rep 289; *Dunstan v Tresider* (1792) 5 Term Rep 2.

23 *Kempe v Carter* (1587) 1 Leo 55 at 56 per Anderson CJ. It was there said that in the manor of Wadhurst, Sussex, there were two kinds of tenure, socland and bondland, each subject to different customs.

24 *Foiston v Crachrode* (1587) 4 Co Rep 31b; *Pearce v Bacon* (1595) Cro Eliz 390; *Derry v Sanders* [1919] 1 KB 223 at 237, CA, per Scrutton LJ.

25 *Anon* (1579) Dyer 363b (alleged custom for the tenant of a certain tenement to have common, held bad); *Jenkin v Vivian* (1626) Poph 201; *Baker v Brereman* (1635) Cro Car 418 (alleged custom for the occupants of a particular close to have a right of way, held bad); *Polus v Henstock* (1670) 1 Vent 97 (alleged custom for the occupants of a close to repair a fence, held bad); *Pain v Patrick* (1690) 3 Mod Rep 289 at 294 (same point); *Brocklebank v Thompson* [1903] 2 Ch 344 at 353 per Joyce J (doubted whether a custom could be asserted in favour of the inhabitants of certain tenements within a manor). In such cases, the right ought to be claimed by prescription in the que estate.

26 *Abbot of Westminster's Case* (1366) YB 40 Edw 3, Lib Ass, pl 27 (custom claimed in the south part of a vill, held bad).

27 *Edwards v Jenkins* [1896] 1 Ch 308 at 312-313 per Kekewich J (must be a 'particular division known to the law'); *Hall v Nottingham* (1875) 1 ExD 1, *Brocklebank v Thompson* [1903] 2 Ch 344 at 353 per Joyce J (must be a 'definite and distinct district known to the law'). The reasoning here may be based on a mistaken notion that a possible origin for the custom needed to be shown (cf para 620 post). In *Harrop v Hirst* (1868) LR 4 Exch 43, a custom for the inhabitants of a named district within a parish to take water from a spout in the highway was established without any objection being taken on this ground. Cf *R v Ecclesfield Inhabitants* (1818) 1 B & Ald 348 (custom for the inhabitants of a 'certain district or division' within a parish to repair roads).

28 See note 3 supra.

29 *Mercer v Denne* [1905] 2 Ch 538 at 579, 584, CA (where the Court of Appeal held that physical variations in the seashore from time to time did not render it impossible to define with sufficient certainty the land affected by a custom for fishermen to dry their nets upon land adjoining the beach, so as to make the custom void for uncertainty); and see *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J ('it cannot be necessary to

define the limits of land affected by a custom more clearly than those of land comprised in a grant for the same purpose').

30 *Gateward's Case* (1607) 6 Co Rep 59b at 61a; *Roberts v Young* (1619) 1 And 192 (copyholder may not claim common outside the manor by custom, but must prescribe through the lord); *Chafin v Betsworth* (1684) 3 Lev 190; *Millar v Taylor* (1769) 4 Burr 2303 at 2367-2368 per Yates J; *Clarkson v Woodhouse* (1783) 5 Term Rep 412n per Lord Mansfield CJ; *R v St Giles, Cambridge, Inhabitants* (1816) 5 M & S 260, explained in *R v Ecclesfield Inhabitants* (1818) 1 B & Ald 348 at 360 per Lord Ellenborough CJ (alleged custom for parishioners to repair a road in another parish, bad); *R v Rollett* (1875) LR 10 QB 469 at 480-481 per Lush J (alleged custom as to exemption from liability to repair highways); *Jones v Robin* (1847) 10 QB 620 at 635, Ex Ch, per Parke B; *Sowerby v Coleman* (1867) LR 2 Exch 96; *Edwards v Jenkins* [1896] 1 Ch 308 at 313. In *Mounsey v Ismay* (1863) 1 H & C 729, a custom for the inhabitants of Carlisle to hold horse races on a piece of land in a neighbouring extra-parochial hamlet once a year was held good: but the case was decided on demurrer, and the objection that the land was in another locality is not noticed in the judgments (cf *Elwood v Bullock* (1844) 6 QB 383); *Dawson v Willoughby (Surveyor of Highways)* (1864) 5 B & S 920; *R v Ardsley Inhabitants* (1878) 3 QBD 255, CCR. Likewise, a custom giving a cause of action in a local jurisdiction does not give a similar action in the central courts in a suit arising within the locality: *Barney v Leigh* (1626) 1 Rolle Abr 566, line 47; *Langham v Bewett* (1626) Cro Car 68; *Lavie v Phillips* (1765) 3 Burr 1776 at 1782 per Lord Mansfield CJ. Cf *Clement v Abbot of Lilleshall* (1312) 34 Selden Soc 112 (common claimed for the burgesses of Shrewsbury in a place adjoining Shrewsbury); YB Trin 10 Edw 4, f 10, pl 2 (where a custom was recognised for the inhabitants of one place to exercise a right of way in another).

UPDATE

616 Certainty as to locality

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(iv) Certainty/617. Certainty as to persons.

617. Certainty as to persons.

A custom must be certain in respect of the persons or classes of persons whom it is alleged to affect. Thus, a custom extending to all the poor householders in a particular township has been held void for uncertainty[1]. It must be limited to a particular class of persons or section of the public[2] and the categories of persons so defined must be free from vagueness or uncertainty[3]. There cannot be a custom as of right in all the monarch's subjects generally, in as much as the rights possessed by the monarch's subjects are part of the general law of the land, and not the customs of a particular place[4].

It is, however, no objection to the validity of a custom that the persons affected by it are a fluctuating body[5]; or that they form a body which, because of its indefiniteness, is incapable of receiving a grant of the rights which are claimed to exist under an alleged custom[6]. In the case of an immemorial corporation which has changed its name within the time of memory, a custom affecting the corporation may be laid in 'a certain body politic and corporate ... known from time to time by different names', setting out the changes of name[7].

1 *Selby v Robinson* (1788) 2 Term Rep 758 (alleged custom for the poor, necessitous and indigent householders to cut and carry away rotten boughs and branches from a certain close, held bad for uncertainty). Cf *Willingale v Maitland* (1866) LR 3 Eq 103, where a supposed royal grant in favour of 'labouring and poor

people' was held to effect an implied incorporation; but the grant, though not denied, was fictitious (see *Chilton v London Corpn* (1878) 7 ChD 735 at 741-742 per Jessel MR). See also *Steel v Houghton* (1788) 1 Hy Bl 51 (a customary right cannot be claimed for the 'poor', since this is too uncertain a term).

2 YB Hil 11 Hen 7, f 13, pl 8, at f 14; *Fitch v Rawling* (1795) 2 Hy Bl 393 at 398 per Buller J ('what is common to all mankind, can never be claimed as a custom'). The usual limitation of class is to all or some of the inhabitants of the place where the custom operates. However, a custom may extend to all liege subjects exercising a particular trade: *Tyson v Smith* (1838) 9 Ad & El 406, Ex Ch (custom for victuallers to erect booths on the lord's land at the time of a fair); *Elwood v Bullock* (1844) 6 QB 383.

3 Eg YB Pas 13 Edw 3 (Rolls Series) 237 (alleged custom for infants to alienate land as soon as they could count, held bad for uncertainty: as to which see also *Johnson v Clark* [1908] 1 Ch 303 at 311 per Parker J); 14 Edw 3, Fitz Abr, Barre, pl 277 (alleged custom for windfalls to be taken by whichever tenant reached the place first, held bad for uncertainty); YB Mich 8 Edw 4, f 18, pl 30 (alleged custom for the 'men of Kent' to dry nets on the plaintiff's close, held bad for uncertainty); *Tanistry Case* (1608) Dav Ir 28 (alleged custom of the tanistry in Ireland that land should descend to 'the senior and most worthy of the blood and name', held bad for uncertainty); *Selby v Robinson* (1788) 2 Term Rep 758 (see note 1 supra). Cf *New Windsor Corpn v Mellor* [1974] 2 All ER 510; affd [1975] Ch 380, [1975] 3 All ER 44 ('men' and 'bachelors' construed to mean inhabitants).

4 *Earl of Coventry v Willes* (1863) 9 LT 384 at 385, 12 WR 127 at 128 per Cockburn CJ; and see *Fitch v Rawling* (1795) 2 Hy Bl 393 at 399; *Gifford v Lord Yarborough* (1828) 5 Bing 163, HL; *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL; *Bourke v Davis* (1889) 44 ChD 110 at 125; *Lancashire v Hunt* (1894) 10 TLR 448 (affd without reference to this point 11 TLR 49, CA); *Dungarvan Guardians v Mansfield* [1897] 1 IR 420; *Abercromby v Fermoy Town Comrs* [1900] 1 IR 302; and see PARAS 601-602 ante. Such a claim may, however, be framed in terms of a charitable trust of uncertain origin (*R v Doncaster Metropolitan Borough Council* (1986) 57 P & CR 1 (immemorial rights of recreation enjoyed by the public at large)); or it may be attributed to a lost Crown grant (*A-G v Wright* [1897] 2 QB 318, CA).

5 In the great majority of cases where customs have been alleged and established the claims have been set up by a person as a member of some undefined and fluctuating body of persons. The mode of claiming rights under an alleged custom owes its prevalence largely to its being available to persons who are for some reason unable to claim the rights by prescription; see YB Pas 18 Edw 4, f 3, pl 15 (tenants at will); *Foiston v Crachroode* (1587) 4 Co Rep 31b (copyholders); *Rowles v Mason* (1612) 2 Brownl 192 at 198 per Coke CJ; *Bean v Bloom* (1774) 2 Wm Bl 926 at 928 per De Grey CJ. Cf para 632 post.

6 See eg *Hall v Nottingham* (1875) 1 ExD 1; and cf *Lancashire v Hunt* (1894) 10 TLR 310, 448, affd 11 TLR 49, CA. For the inability of a fluctuating body to prescribe see also YB Hil 7 Edw 4, f 26, pl 3; *Boteler v Bristow* (1475) YB Trin 15 Edw 4, f 29, pl 7; YB Pas 18 Edw 4, f 3, pl 15; YB Mich 18 Hen 8, f 1, pl 5; *Foxall v Venables* (1590) Cro Eliz 180; *Fowler v Dale* (1594) Cro Eliz 362; *Goodday v Michell* (1595) Cro Eliz 441, Owen 71; *Inhabitants de Haley* (1633) W Jo 297 per Noy A-G; *Abbot v Weekly* (1665) 1 Lev 176; *Re Hainault Forest Act 1858* (1861) 9 CBNS 648.

7 *R v Kingston Corpn*, cited in 6 M & S 365n; and see *Ouston v Whittyngton* (1536) CP 40/1089, m 351; 109 Selden Soc 147; Dyer 279b. Cf, as to prescription, *Abbot of Bermondsey's Case* (1467) YB Hil 7 Edw 4, f 32, pl 20; YB Trin 20 Edw 4, f 6, pl 7; *Prior of Shene v Prior of St John's* (1482) YB Hil 22 Edw 4, f 43, pl 6; Bro Abr, Prescription, pl 81; Hesketh's reading on the Carta de Foresta, 113 Selden Soc at 46; Spelman's reading on Quo Warranto (1519) 113 Selden Soc at 87, 114, 123, 143; *Bolton v Throgmorton* (1682) Skin 55; *Beadsworth v Torkington* (1841) 1 QB 782.

(v) Continuity

618. Need for continuity.

The fourth prerequisite for a valid custom is said to be that it must have continued without interruption since time immemorial[1]. There is, however, no need for proof of actual continuous user since 1189, any more than there is for proof of an origin before 1189. The doctrine relates rather to the long user necessary to raise the presumption of immemorial existence. When there has been interruption or disturbance of that user, acquiesced in by the persons who are

alleged to be entitled to exercise the right, and who have not either by legal or illegal means attempted to prevent the disturbance or interference, and the disturbance or interruption has not been for a short time but for many years, a strong presumption arises that there never was any such custom as that alleged[2].

1 See *Tanistry Case* (1608) Dav Ir 28 at 32; *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch, per Tindal CJ; *Simpson v Wells* (1872) LR 7 QB 214; and PARAS 606-608 ante.

2 *Hammerton v Honey* (1876) 24 WR 603 per Jessel MR.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(3) ESSENTIAL CHARACTERISTICS OF CUSTOM/(v) Continuity/619. Interruption in continuity.

619. Interruption in continuity.

There is a distinction between an interruption of the right which forms the subject matter of the custom, and an interruption in the possession of that right, or the user and enjoyment of that right[1]. If there is an interruption of the right, no matter for how short a period, the right is extinguished; and, if it were possible to revive it, its revival would involve a new beginning within time of legal memory, and thereupon the custom would be void[2]. An interruption of the possession or enjoyment of the right, however, may occur and continue for as much as ten or 20 years without destroying the custom[3], the effect of such an interruption being merely to render the custom more difficult of proof[4].

1 Co Litt 114b; 1 Bl Com (14th Edn) 77; *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J; affd [1905] 2 Ch 538, CA.

2 1 Bl Com (14th Edn) 77. As to extinguishment see PARAS 646-649 post.

3 Co Litt 114b; 1 Bl Com (14th Edn) 77.

4 *Mercer v Denne* [1905] 2 Ch 538, CA. See also *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 517 (where it was admitted that because the right of the inhabitants had, on wrong advice, been disputed by the borough in 1875, the right had not been enjoyed since that date); affd [1975] Ch 380, [1975] 3 All ER 44, CA; *Scales v Key* (1840) 11 Ad & El 819 (where no instance of the enjoyment of the right could be shown since 1689); and as to non-user see PARAS 624, 649 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(4) CREATION, ENJOYMENT AND PROOF OF CUSTOM/(i) Creation and Origin/620. Origin need not be proved.

(4) CREATION, ENJOYMENT AND PROOF OF CUSTOM

(i) Creation and Origin

620. Origin need not be proved.

It is not incumbent upon a person seeking to establish an alleged custom to show how it originated. Provided the custom is immemorial, certain, and reasonable in itself, and conforms to the requirements already mentioned[1], it is unnecessary to trace it to its origin[2], or to show how it might have had a legal origin otherwise than by an Act of Parliament[3].

The doctrines of prescription and custom are on quite different footings as regards the necessity of inquiry into the origin of rights alleged to exist under them. In order that a claim by prescription may succeed, the right which is alleged to exist must be such as could have formed the subject matter of a grant[4], whereas the subject matter of a custom is incapable of being created by an ordinary deed or charter of grant[5]. Evidence of long user of something which is capable of being granted may therefore lead to the presumption of a lost grant rather than a custom[6].

1 See PARAS 606-619 ante.

2 *Cocksedge v Fanshaw* (1779) 1 Doug KB 119 at 132 per Lord Mansfield CJ; *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch, per Tindal CJ; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 877, [1940] 3 All ER 101 at 110, HL. See also *Hix v Gardiner* (1614) 2 Bulst 195 at 196 per Coke CJ, and *Pain v Patrick* (1690) 3 Mod Rep 289 at 293, where it was pointed out by way of example that the origin of the customs of gavelkind and borough English was unknown.

3 *Gateward's Case* (1607) 6 Co Rep 59b per Coke CJ ('Every prescription ought to have by common intendment a lawful beginning, but otherwise it is of custom, for that ought to be reasonable, but need not be intended to have a lawful beginning as custom to have land devisable or of the nature of gavelkind. These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning, by no grant, or act or agreement but only by Parliament'); 1 Bl Com (14th Edn) 77. See also *Hix v Gardiner* (1614) 2 Bulst 195 at 196 per Coke CJ (quoted in para 609 note 3 ante); *Cocksedge v Fanshaw* (1779) 1 Doug KB 119 at 132 per Lord Mansfield ('The rule of law is, that whenever there is an immemorial usage, the court must presume everything possible which could give it a legal origin'); *R v Ecclesfield Inhabitants* (1818) 1 B & Ald 348; *R v Rollett* (1875) LR 10 QB 469 at 476 per Lush J ('It is not necessary in pleading a custom to state how it originated. It is sufficient to allege the fact that it existed from time immemorial'); *Brocklebank v Thompson* [1903] 2 Ch 344 at 350; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 877, [1940] 3 All ER 101 at 110, HL ('Nor is it necessary for those who allege a custom to show how it arose or might have arisen.'); *Egerton v Harding* [1975] QB 62 at 72, 73, [1974] 3 All ER 689 at 695, CA, per Scarman LJ. Statements in certain cases suggesting that it may be necessary to show a possible legal origin for an alleged custom (see eg *Elwood v Bullock* (1844) 6 QB 383 at 411; *Mills v Colchester Corpn* (1867) LR 2 CP 476 at 487; *Edwards v Jenkins* [1896] 1 Ch 308 at 312; cf *London and North Western Rly Co v Fobbing Levels Comrs* (1896) 75 LT 629) are probably due to confusion between a claim by custom and a claim by prescription in the strict sense, as to which see PARA 604 ante. As to the necessity for evidence that a claim by prescription is referable to a possible legal origin see *Johnson v Barnes* (1872) LR 7 CP 592 at 604; affd (1873) LR 8 CP 527, Ex Ch; and EASEMENTS AND PROFITS A PRENDRE.

4 *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch, per Tindal CJ.

5 *Gateward's Case* (1607) 6 Co Rep 59b per Coke CJ, quoted at note 3 supra; *Rowles v Mason* (1612) 2 Brownl 192 at 198 per Coke CJ; *Clarkson v Woodhouse* (1783) 5 Term Rep 412n per Lord Mansfield CJ; *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 654, HL, per Lord Blackburn; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 877, [1940] 3 All ER 101 at 110, HL.

6 See *Bedle and Beard v Wingfield* (1607) 12 Co Rep 4 at 5; *A-G v Wright* [1897] 2 QB 318, CA; *Egerton v Harding* [1975] QB 62 at 70-72, [1974] 3 All ER 689 at 693-694, CA, per Scarman LJ.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(4) CREATION, ENJOYMENT AND PROOF OF CUSTOM/(i) Creation and Origin/621. Legal memory.

621. Legal memory.

If a custom is proved to have existed actually or presumptively since time immemorial, no evidence is admissible to show that the the custom originated earlier than 1189 or that its origin was wrongful, provided only that the custom is not unreasonable[1]. Discovery of the actual origin of a practice which is relied upon as proving existence of a custom may, however, go to show that the custom does not in fact exist. Thus, if the alleged custom can be shown to have originated in wrong or usurpation[2], or in some other unreasonable manner[3], or to have owed its origin to an invalid grant[4], or to have definitely been introduced subsequently to the

year 1189[5], the presumption raised by proof of its enjoyment in more recent times will be rebutted and the claim will fail.

There are several examples in medieval court rolls of agreements made after 1189 between manorial lords and their tenants to alter the customs of the manor; but in law a custom cannot be so altered by agreement[6], because the new or modified custom could not possibly be immemorial. Proof of alteration by agreement since 1189 would nowadays, therefore, be evidence either to contradict an alleged custom or to establish as the true custom that which existed before the purported alteration[7].

1 See PARA 609 ante.

2 *Tanistry Case* (1608) Dav Ir 28 at 32.

3 See *Tyson v Smith* (1838) 9 Ad & El 406 at 422, Ex Ch, per Tindal CJ.

4 *Lockwood v Wood (No 3)* cited in (1844) 6 QB 67 note (a).

5 *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 519 per Foster J (if a right derives from a statute it cannot be a custom); affd [1975] Ch 380, [1975] 3 All ER 44, CA. See further PARA 608 note 3 ante.

6 105 Selden Soc 207 per Frowyk (in the Inner Temple, circa 1490).

7 *Chapman v Cowlan* (1810) 13 East 10. See also *Marquis of Anglesey v Lord Hatherton* (1842) 10 M & W 218 at 240 per Lord Abinger CB.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(4) CREATION, ENJOYMENT AND PROOF OF CUSTOM/(i) Creation and Origin/622. Proof of user.

622. Proof of user.

There is no rule of law as to the extent of evidence required to establish a custom[1], for instance in relation to the length of time during which an actual user or enjoyment of rights alleged to derive from a custom must be shown. As a general rule proof of the existence of the custom as far back as living witnesses can remember is treated, in the absence of any sufficient rebutting evidence[2], as proving the existence of the custom from time immemorial[3]. The periods during which living witnesses have been able to testify as to the existence of customs, and which have been held sufficient to raise the presumption of existence of the custom from time immemorial, have varied greatly in different cases[4], but 20 years may be sufficient[5]. In copyhold cases, proof of a single instance may be sufficient to establish a presumption of immemorial user[6].

Although evidence of reputation, without proof of actual user, is not admissible to establish private rights, it has been admitted to establish the details of a custom[7].

1 See *Hanmer v Chance* (1865) 4 De G J & Sm 626 at 635 per Lord Cranworth LC ('The law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be drawn. It is the province of a jury to draw these conclusions of fact.').

2 See PARAS 608 ante, 622 post.

3 See *Jenkins v Harvey* (1835) 1 Cr M & R 877 at 894 per Parke B; *Brocklebank v Thompson* [1903] 2 Ch 344 at 350 per Joyce J; *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; *Angus v Dalton* (1877) 3 QBD 85 at 104; *Bastard v Smith* (1837) 2 Mood & R 129 at 136 per Tindal CJ; *Truro Corpn v Rowe* [1901] 2 KB 870 at 877 per Wills J; on appeal [1902] 2 KB 709, CA; and PARAS 626-627 post. Cf *Leuckart v Cooper* (1835) 7 C & P 119 at 126 per Tindal CJ (user 'at a distant time' raises the presumption of immemorial user).

4 Thus, the testimony of witnesses extended over upwards of 70 years in *Mercer v Denne* [1905] 2 Ch 538, CA, and nearly 60 years in *Jenkins v Harvey* (1835) 1 Cr M & R 877. See also *Re Deborah E4-789, Kitchooalik and Enooyak v Tucktoo* [1972] 5 WWR 203 (Northwest Territories CA) ('Eskimo' custom of adoption said to be of great antiquity held valid notwithstanding failure to comply with Ordinances of the Northwest Territories relating to adoption). Cf *Jackman v Hoddesdon* (1594) Cro Eliz 351 (60 years' user held insufficient). See also PARA 607 ante.

5 *R v Joliffe* (1823) 2 B & C 54 per Abbott CJ; *Brocklebank v Thompson* [1903] 2 Ch 344 at 350.

6 *Doe d Mason v Mason* (1770) 3 Wils 63; *Roe d Bennett v Jeffery* (1813) 2 M & S 92. These were both instances taken from records beyond living memory. Cf *Betrige v Trott (No 2)* (1571) Dyer's reports in 110 Selden Soc 221, pl 306, where the single precedent was within 30 years of the trial; Dyer CJ apparently regarded this as unconvincing evidence, though it was accepted by the jury.

7 *Roe d Beebee v Parker* (1792) 5 Term Rep 26 (presentment by homage at manorial court); *Doe d Foster v Sisson* (1810) 12 East 62 (witnesses); *Chapman v Cowlan* (1810) 13 East 10 (document signed by copyholders); *Marquis of Anglesey v Lord Hatherton* (1842) 10 M & W 218 (declaration of custom by some of the copyholders of a manor), where Lord Abinger CB said at 239 that 'a custom lies in reputation'; *Earl of Dunraven v Llewellyn* (1850) 15 QB 791 at 809, 812, Ex Ch, per Parke B; *Heath v Deane* [1905] 2 Ch 86 at 91-92 per Joyce J; and as to custumals see PARA 642 post. Evidence of reputation has likewise been admitted to prove private rights affecting a substantial class of persons: *Webb v Petts* (undated) Noy 44; *Weeks v Sparke* (1813) 1 M & S 679; *White v Lisle* (1819) 4 Madd 214; *Prichard v Powell* (1845) 10 QB 589; and see *Richards v Bassett* (1830) 10 B & C 657 at 663 per Littledale J (evidence of reputation admissible in the case of public rights). Cf *Ratcliffe v Chaplin* (1610) 4 Leon 242 per Coke CJ (proof of user necessary).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(4) CREATION, ENJOYMENT AND PROOF OF CUSTOM/(ii) Enjoyment/623. Enjoyment must be of right.

(ii) Enjoyment

623. Enjoyment must be of right.

The enjoyment of a right claimed under an alleged custom must be 'as of right' in order to support the claim[1]; that is to say, all acts which are alleged to have been done under and by virtue of the custom must have been done without violence, without stealth or secrecy, and without leave or licence asked for and given, either expressly or impliedly, from time to time[2]. If the acts of user or enjoyment relied on to support a claim under an alleged custom are done in pursuance of some licence, formal or otherwise[3], those acts will not support the claim. An alleged custom for a person or persons to obtain a licence to do some act admits the necessity of obtaining such a licence, and therefore any acts done under the custom will not appear to have been done as of right; consequently such a custom is invalid[4]. However, the fact that certain payments are required by the custom as consideration for the doing of certain acts does not prevent those acts being done as of right and so founding a custom[5].

1 Co Litt 113b ('Both to customs and prescriptions, these two things are incidents inseparable, viz possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable'); 1 Bl Com (14th Edn) 76-77 ('To make a particular custom good ... It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting').

2 *Mills v Colchester Corpn* (1867) LR 2 CP 476 at 486 per Willes J. See also *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 at 81-82, HL; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833 at 839, CA; *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 515, 518; affd [1975] Ch 380, [1975] 3 All ER 44, CA. Continual protests when acts were done under an alleged custom may be evidence that the acts were not done as of right: *Payne v Ecclesiastical Comrs and Landon* (1913) 30 TLR 167.

3 Proof of a custom may fail if the acts relied upon were done by tolerance, and were of a minor nature: *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA (where a custom was alleged that all the

inhabitants of the County Palatine of Durham were entitled to enter on a strip of the foreshore in the county to take away sea-washed coal, and the evidence showed that until recent years there was only a small scale local practice, tolerated by the Crown, to take the coal; it was held that this was not sufficient to support the custom as alleged or an alternative claim of right based on the fiction of a lost grant by the Crown); in this case *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL, cited in para 631 note 2 post, was distinguished.

4 *Mills v Colchester Corpn* (1867) LR 2 CP 476 (where a custom was alleged that a corporation of an ancient borough had of right held yearly courts, and at those courts granted a licence to dredge oysters in a fishery for the ensuing oyster season to every oyster dredger inhabiting the borough who had served an apprenticeship to any oyster dredger licensed by the corporation; the custom was not established); affd (1868) LR 3 CP 575. See also *Sitwell v Worrall* (1898) 79 LT 86. Cf *Groves v Bridges*, cited in *Porphyry v Legingham* (1668) 2 Keb 344 per Moreton J (custom that on payment of ten years' rent the lord should license the tenant to let for 99 years, and if he refused he might do it without licence, held good).

5 See, for instance, *Tyson v Smith* (1838) 9 Ad & El 406, Ex Ch (where a custom to enter the land of another at certain times, and to erect booths upon it, paying a certain sum to the owner of the soil, was held good); *Elwood v Bullock* (1844) 6 QB 383 (a similar custom, subject to the payment of a reasonable compensation to the owner of the soil).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(4) CREATION, ENJOYMENT AND PROOF OF CUSTOM/(ii) Enjoyment/624. Non-user.

624. Non-user.

It is not essential that the user or enjoyment of a right should have been a continuous enjoyment without interruption, for no amount of non-user will of itself extinguish a custom which has once existed[1]. The effect of non-user, as against persons seeking to establish an alleged custom, is to raise a strong presumption that there never was such a custom as that alleged; for where the enjoyment of alleged rights has been interrupted and the interruption acquiesced in for a great number of years by those interested in upholding those rights, there is a strong presumption that those rights were never good[2]. The same considerations do not, however, apply when it can be shown that the non-user was accidental or due to natural causes[3].

1 See *Scales v Key* (1840) 11 Ad & El 819 (where a custom was held to exist in 1834, although no exercise of a right under it had been shown since 1689). Lord Denman CJ said (at 825): 'The finding of the jury, that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished.' See also 1 Bl Com (14th Edn) 77; and Co Litt 114b; *Nowell v Hicks* (1601) 2 Co Inst 653 (customary right not lost by waiver for 20 years); *Heath v Deane* [1905] 2 Ch 86 at 93; *Wyld v Silver* [1963] Ch 243 at 254-255, [1962] 3 All ER 309 at 313, CA, per Lord Denning MR (who treated the right in that case as customary, though it seems more properly to have been a franchise); *New Windsor Corpn v Mellor* [1974] 2 All ER 510 (affd [1975] Ch 380, [1975] 3 All ER 44, CA) (no user since 1875); *Re Yateley Common* [1977] 1 All ER 505, [1977] 1 WLR 840; and PARA 649 post.

2 See *Hammerton v Honey* (1876) 24 WR 603 per Jessel MR. See also PARAS 618-619 ante.

3 See *Mercer v Denne* [1904] 2 Ch 534; affd [1905] 2 Ch 538, CA, where the land claimed to be affected by an alleged custom had for many years been covered by the sea. The mere non-user during the period that the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession: *Mercer v Denne* [1904] 2 Ch 534 at 556 per Farwell J.

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625. Modification of rights.

Both the nature of the right enjoyed and the extent of the land over which it is exercised[1] are capable of reasonable modification and extension. Thus, in the case of a custom to carry on a trade, the nature of the trade and the mode of its exercise may vary with the advent of improved methods[2]; or, in the case of a custom to play games on a close of land, the nature of the games played may vary with the prevailing fashion[3].

So, also, where land is gradually added to other land which is subject to a particular custom, as by the gradual retrocession of the sea, the land thus added becomes subject to the custom to which the principal land is subject, notwithstanding that this accretion, or part of it, has taken place since the commencement of legal memory[4]. The accretion will be treated as if it had occurred before 1189[5]. A customary duty to repair sea walls will attach to walls which have been rebuilt within legal memory[6].

Payments of money may vary in amount over time, as the value of money changes, but in such cases the custom must be laid in terms of a duty to pay a reasonable rather than a specific sum[7]. Customary payments may become due from an increasing number of people as the population increases[8].

1 See PARA 616 note 2 ante.

2 Cf *Duke of Norfolk v Myers* (1819) 4 Madd 83 at 118, where Leach V-C questioned whether a custom of mill-suit (see PARA 613 note 3 ante) could be extended from an ancient water-mill to a steam-mill.

3 *Mercer v Denne* [1905] 2 Ch 538 at 581, CA (custom for fisherman to lay nets on land allowed to extend to nets treated with oil, which take longer to dry, or to nets of a different form from those probably used in 1189); *City of London v Vanacre* (1699) 12 Mod Rep 269 at 271 per Holt J ('General customs may be extended to new things which are within the reason of those customs'); *Snelling's Case* (1595) 5 Co Rep 82 at 83 (where a custom of London that the executor of a citizen could be sued for the debt of the citizen after his decease was held to extend to the administrator although no action could be brought against administrators before 31 Edw 3 Stat 1 c 11 (Administration on intestacy) (1357) (repealed)); and see *Dyce v Lady Hay* (1852) 1 Macq 305 at 312, HL; *Wake v Hall* (1883) 8 App Cas 195 at 212, HL, per Lord FitzGerald (mining custom entitles miners to use all modern appliances); *London and North Western Rly Co v Fobbing Levels Comrs* (1896) 75 LT 629 at 632 (where it was held no answer to an allegation of a custom to repair sea walls that the particular walls had not been built for more than 30 or 40 years as the custom to keep up some sort of defence against the sea may have existed before). As to new games and recreations see PARA 634 post.

4 *Mercer v Denne* [1904] 2 Ch 534 at 559 per Farwell J; affd [1905] 2 Ch 538, CA, a case where a custom was alleged for fishermen to dry their nets on certain land which was shown to have been formed by the gradual retirement of the sea.

5 *Mercer v Denne* [1904] 2 Ch 534 at 559 per Farwell J; affd [1905] 2 Ch 538, CA.

6 *London and North Western Rly Co v Fobbing Levels Comrs* (1897) 75 LT 629 at 632.

7 *Laybourn v Crisp* (1838) 4 M & W 320 at 330; *Shephard v Payne* (1862) 12 CBNS 414 (affd 16 CBNS 132, Ex Ch) (decided on a case stated without pleadings); *Mills v Colchester Corpn* (1867) LR 2 CP 476 at 484 (customary fee for fishing licence; in this case the custom was not proved); *Bryant v Foot* (1868) LR 3 QB 497 at 508, Ex Ch.

8 *R v Hall* (1866) LR 1 QB 632 at 640 (a custom to make Easter offerings to the incumbent of a parish, though confined to householders in the parish, will extend to the owners of houses built recently).

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(iii) Proof

626. Nature of proof.

All customs of which the courts do not take judicial notice must be clearly proved to exist, the onus of establishing them being upon the parties relying upon their existence[1]. Proof must be made either by matter of record or by evidence of usage since time immemorial[2]. Evidence to prove a custom must not only be consistent with the custom which is alleged, but must also prove a custom which is no wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest[3].

1 *Moult v Halliday* [1898] 1 QB 125 at 129 per Channell J. All such customs must be specially pleaded: *Anon* (1599) cited in Cro Car 562; *Winton Corpn v Wilks* (1705) 2 Ld Raym 1129 at 1134-1135 per Powys and Gould JJ.

2 *Torald v Copper* (1311) YB Mich 5 Edw 2 (63 Selden Soc) 61 (record evidence not required if there is evidence of immemorial usage); *Beaumont v Bishop of Coventry and Lichfield* (1313) YB Trin 6 Edw 2 (36 Selden Soc) 53-56. See also PARA 622 ante.

3 *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR. See *Farquhar v Newbury RDC* [1908] 2 Ch 586; affd [1909] 1 Ch 12, CA; and PARA 615 ante.

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627. Usual method of proof.

In proving an immemorial custom, the usual course taken is to call persons of middle or old age to state that in their time, usually at least half a century, the custom has always prevailed[1]. This is considered, in the absence of countervailing evidence, to show that the custom has existed from all time. There are two sorts of countervailing evidence. First, other old persons may be called to show that there was an interruption during the period spoken of by the first set of witnesses; secondly, evidence may be given that, from the nature of the case, it was quite impossible that such a right should have existed from time immemorial[2], or that there is some legal difficulty or obstacle in the way which makes the alleged assertion of the right incompatible with the law of the country[3]. Whether the evidence supports the custom as alleged or not is a question of fact for the court[4]. A custom possible in law, being reasonable and otherwise fulfilling the requisites of a good custom, may be established by very slender evidence[5].

1 *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; see also *Lanchbury v Bode* [1898] 2 Ch 120 at 125 per Kekewich J; and see PARA 622 ante.

2 Eg where the alleged custom was to pay a sum of money which would have been exorbitant in 1189: *Traherne v Gardner* (1856) 5 E & B 913 at 940 per Lord Campbell CJ (customary fee of 13 shillings and fourpence for a steward would be 'rank'); *Bryant v Foot* (1868) LR 3 QB 497, Ex Ch (alleged custom for rector to take 13 shillings for celebrating a marriage). Customs may, however, be modified in their operation over time: see PARA 625 ante. Cf *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 871, [1940] 3 All ER 101 at 106, HL, where it is said that copyhold has become so well established that it is no longer appropriate to consider whether as a matter of historical fact copyholds were known in 1189, or even whether the entailing of copyholds was known at that time. Cf para 642 post.

3 *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; see also *Mercer v Denne* [1904] 2 Ch 534 at 555-556 per Farwell J; *Bastard v Smith* (1837) 2 Mood & R 129 at 136 per Tindal CJ; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA.

For the methods of proving customs and the relative values of the source of proof see *R v Joliffe* (1823) 2 B & C 54 (custom for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury; the defendant proved that for more than 20 years the precept to the bailiff had always contained a list of persons whom the steward directed him to summon as jurors; the court held that slight evidence, if uncontradicted, was cogent evidence); *Bastard v Smith* (1838) 2 Mood & R 129; *Bremner v Hull* (1866) LR 1 CP

748 (custom as to the appointment of churchwardens); *Hammerton v Honey* (1876) 24 WR 603 (alleged custom for the inhabitants of a hamlet to use a green for the purposes of recreation and amusement held not proved; it was admitted that after 20 years of disuse of the alleged custom, the strictest possible evidence of the custom must be adduced; cf *New Windsor Corpn v Mellor* [1974] 2 All ER 510; affd [1975] Ch 380, [1975] 3 All ER 44, CA, where there had been no user since 1875); *Brocklebank v Thompson* [1903] 2 Ch 344 (customary churchway in favour of the inhabitants of a parish held proved upon evidence which failed to prove a similar manorial custom); *Mercer v Denne* [1905] 2 Ch 538, CA; *Ramsgate Corpn v Debling* (1906) 22 TLR 369 (alleged custom for the inhabitants of Ramsgate to place chairs on the seashore held not proved); *Hough v Clark and Hall* (1907) 23 TLR 682 at 683; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; *Farquhar v Newbury RDC* [1908] 2 Ch 586; affd [1909] 1 Ch 12, CA.

4 *Bremner v Hull* (1866) LR 1 CP 748 at 758.

5 *Johnson v Clark* [1908] 1 Ch 303 at 309 per Parker J. See also PARA 622 note 6 ante.

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628. Other modes of proof; London.

The only customs which need not be proved by parol evidence are the customs of gavelkind and Borough English, of which the courts will take judicial notice[1], and any customs which have been established as a matter of record in a superior court of record[2]. Prominent among the latter are those customs of the City of London which have been certified by the Recorder of London. Once such a certificate has been entered or filed of record the court will take notice of the custom and it cannot be certified again[3], though the court will not notice such a custom unless it is pleaded[4]. It is said that the recorder's certificate cannot be challenged in court, and that the parties cannot ask the court to request that it be remitted for reconsideration[5].

The certification of its customs is itself a custom of London, which is judicially noticed by the courts[6]. If a custom of London, not already of record, is in issue, one of the parties may plead the custom and request certification, in which case a writ of certiorari is sent by the court to the mayor and aldermen, requiring them to certify through the recorder whether there is such a custom as alleged[7]. Under the custom, the recorder acts on behalf of the corporation in preparing and making the return to the writ. It is improper for the recorder to return that it is not apparent from the city records whether the custom exists or not, for a certificate must be made one way or the other[8]. The recorder may and perhaps should hear argument from the parties before making the return[9]. Although a written return is made in the name of the mayor and aldermen, and filed by the court upon receipt, the custom requires the recorder to appear at the bar of the court and make the return orally on behalf of the corporation[10]. If the parties choose not to plead the custom of certification, a custom of London may be tried by evidence in the usual way[11], provided that it is not a custom which has already been certified.

The following customs of London, most of which have now fallen into disuse or been abolished by statute, have been certified by the recorder and acted upon by the courts[12]: the procedure of foreign attachment[13]; that every shop in the City of London in which goods were publicly exposed for sale was market overt for goods professedly dealt in there[14]; that a married woman carrying on a trade apart from her husband within the City was liable as a feme sole[15]; the customary mode of distribution by thirds of a freeman's estate upon his death intestate[16]; that citizens and non-citizens could bequeath land by will[17]; that a hostler may keep and sell a horse left in his inn once it has eaten its value[18]; that the wardship of orphan children of freemen belonged to the City[19]; that infants could bind themselves apprentice at the age of 14 years[20]; that a man may rebuild his house upon ancient foundations to what height he pleases without regard to ancient lights[21]; and numerous privileges relating to local government, including a custom that when any custom was found in any part to be hard or defective the subject-matter could be regulated by a byelaw[22]. There are also some ecclesiastical customs in the City of

London[23], but most of these are the customs of the individual parishes in London rather than of the whole City[24].

1 Littleton's Tenures s 265; Co Litt 175b; 1 Bl Com (14th Edn) 76. Customary modes of descent were abolished except for certain special cases by the Law of Property Act 1922 s 122, Sch 4 (repealed); and the Administration of Estates Act 1925 s 45(1)(a): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 584. The following cases were decided before 1 January 1926 when the latter Act came into force (see s 58(2) (repealed)): *Re Chenoweth, Ward v Dwelley* [1902] 2 Ch 488 (the custom of gavelkind); *Clements v Scudamore* (1703) 2 Ld Raym 1024 (the custom of borough English); *Rider v Wood* (1855) 24 LJ Ch 737 (where it was held that if a custom was alleged to be according to the tenure of borough English, the court would take judicial notice of all the incidents of this custom, but if the incidents of the custom only were alleged, the court would not go beyond the allegations); *Payne v Barker* (1662) O Bridg 18 (cited in *Rider v Wood* supra at 741).

2 Eg *Cort v Birkbeck* (1779) 1 Doug KB 218 (decree of the Court of Exchequer in 1722 admissible as evidence of a custom). Cf *Biddulph v Ather* (1755) 2 Wils 23, as to when a record is not conclusive evidence of a custom. Judgments of courts not of record, such as manorial courts, are admissible as evidence of custom, but the evidence may be controverted: see PARA 642 post.

3 *Blacquiere v Hawkins* (1780) 1 Doug KB 378 at 380 per Lord Mansfield CJ. It is said in *Piper v Chappell* (1845) 14 M & W 624 at 649 per Parke B, that a court will only take notice of customs recorded in the same court; this restriction was not, however, generally observed (see *Fox v Purssell* (1855) 3 Sm & G 242); since the Supreme Court of Judicature Act 1873 (repealed) all courts have taken notice of customs so certified (see now the Supreme Court Act 1981 s 49(2)(b)). In *Day v Savadge* (1614) Hob 85 it was held that customs of London affecting the corporation itself could not be certified by the recorder but were triable by jury; but this decision was questioned or distinguished in *Appleton v Stoughton* (1638) Cro Car 516; *Hartop v Hoare* (1743) 3 Atk 44 at 52.

4 *Arguille v Hunt* (1719) 1 Stra 187; *Hartop v Hoare* (1743) 3 Atk 44 at 52 per Lee CJ. The most formal course then is to produce the records (now in the Public Record Office) of the former certifications: *Piddington v Main* (1726) Mos 6. In practice, the courts have sometimes taken notice of recorded customs on the authority of law reports.

5 *Bruin v Knott* (1842) 12 Sim 436 at 455. Cf the contrary suggestion in *Tomkyns v Ladbroke* (1755) 2 Ves Sen 591 at 592 per Lord Hardwicke LC. And see *R v Bagshaw* (1634) Cro Car 361, where the recorder explained the meaning of a negative certificate.

6 It was claimed before the justices in eyre in *R v City of London* (1321) 85 Selden Soc 54 at 55; Placita de Quo Warranto, 449 ('*quod Major et Aldermanni debent oretenus recordare omnes consuetudines suas antiquas quotienscumque et quandoque aliquid in actu seu questione cadat coram quibuscumque justiciariis quod tangat consuetudines suas predictas et quod hoc eis allocetur*'). The custom seems to be peculiar to London, though it may also operate in Bristol, which claims to use the same customs as London.

7 *Anon* (1465) CP 40/814, m 415; YB Pas 5 Edw 4, Long Quinto, f 30; *Bourgchier v Colyns* (1486) YB Mich 22 Edw 4, f 30, pl 11; Mich 2 Ric 3, f 2, pl 7; Pas 1 Hen 7, f 21, pl 8; CP 40/878, m 404; affd KB 27/897, m 30; *Ernley v Garth* (1490) 102 Selden Soc 96 at 99 (custom set out in pleading); YB Pas 11 Hen 7, f 21, pl 8 (misdated); Rastell, Entries (3rd Edn) 143a (Latin form of writ set out); *Appleton v Stoughton* (1638) Cro Car 516; *Crosby v Hetherington* (1843) 4 Man & G 933 at 948 (form of writ set out in English); *Westoby v Day* (1853) 2 E & B 605 at 627. In *London Corpn v Cox* (1867) LR 2 HL 239 at 242, the recorder made an oral certificate upon a demurrer to the custom as pleaded.

8 *Anon* (1726) Mos 7.

9 See, eg, *Chace v Box* (1699) 1 Eq Cas Abr (where the certificate recited that counsel had been heard); *Crosby v Hetherington* (1843) 4 Man & G 933 at 952 (counsel heard on both sides before the recorder).

10 *Ernley v Garth* (1490) 102 Selden Soc 96 at 99 (form of return set out); *Chace v Box* (1699) 1 Eq Cas Abr (form of return set out); *Plummer v Bentham* (1757) 1 Burr 248 at 249 (form of return set out); *Bruin v Knott* (1842) 12 Sim 436 at 452; *Crosby v Hetherington* (1843) 4 Man & G 933 at 952 (form of return, said to be signed by 15 aldermen); *Westoby v Day* (1853) 2 E & B 605 at 628 (form of return, said to be engrossed on parchment and filed). The recorder should appear at the bar in his gown as recorder, and not in his bar gown: *Plummer v Bentham* supra at 251 (purple, not scarlet).

11 YB Pas 5 Edw 4, Long Quinto, f 30; Bro Abr, Trials, pl 96; *Bilford v Lowe* (1595) CP 40/1556, m 414, cited in 31 LQR 281; *R v Bagshaw* (1634) Cro Car 347 (issue joined on a custom of London); *La Vie v Phillips* (1765) 3 Burr 1776 (tried by jury, and proved by reference to a medieval record called the Liber Albus). In *Bradbee v Christ's Hospital* (1842) 4 Man & G 714, the reasonableness of a custom of London, as pleaded, was considered without certification or judicial notice following an arbitration. In *Clayton v Le Roy* [1911] 2 KB 1031, a

suggestion that a custom should be certified by the recorder was 'not cordially received by the parties' (per Scrutton J at 1040). Cf *Leathersellers Co v Beecon* (1681) T Jo 149, where it was held on demurrer that a custom of London should not be tried by jury but by certificate.

12 For the voluminous learning on these and other customs see 1 Rolle Abr 550, Customs de London; Bac Abr, Customs of London; Vin Abr, Customs of London; A Pulling *Laws, Customs and Regulations of the City and Port of London* (2nd Edn, 1844). The customs of London were confirmed by Magna Carta c 9; for the effect of this confirmation see PARA 647 post.

13 YB Pas 5 Edw 4, Long Quinto, f 30; *Bourgchier v Colyns* (1486) YB Mich 22 Edw 4, f 30, pl 11; Rastell, Entries (3rd Edn) 142b, 156b; *Roberthon v Norroy King of Arms* (1553) Dyer 83a; *Harwood v Lee* (1561) Dyer 196b; *Crosby v Hetherington* (1843) 4 Man & G 933; *Westoby v Day* (1853) 2 E & B 605; *Levy v Lovell* (1880) 14 ChD 234, CA. However, since the decision in *London Corpn v London Joint Stock Bank* (1881) 6 App Cas 393, HL, rejecting modern extensions of the custom, it has fallen into disuse.

14 *Abbot of St Osyth v Hayford* (1447) CP 40/746, m 323; *Palmer v Wolley* (1595) Cro Eliz 454; *Market-Overt Case* (1596) 5 Co Rep 83b; *Lyons v De Pass* (1840) 11 Ad & El 326; *Crane v London Dock Co* (1864) 5 B & S 313; *Hargreave v Spink* [1892] 1 QB 25; *Clayton v Le Roy* [1911] 2 KB 1031; and see MARKETS, FAIRS AND STREET TRADING. This was also the custom in other cities: 21 Selden Soc lxxviii. It was also claimed to be the custom of London that every street was a common market for all wares: *Prior of Llantony v Courteyne* (1472) YB Pas 12 Edw 4, f 1, pl 3; contd f 8, pl 22; CP 40/872, m 401 (demurrer but no judgment). The rule that title to stolen goods may pass by sale in market overt was abolished by the Sale of Goods (Amendment) Act 1994.

15 *Langham v Bewett* (1627) Cro Car 68; *La Vie v Phillips* (1765) 3 Burr 1776; and see *Hill v Hever* (1450) CP 40/758, m 110 (same custom pleaded but not certified). The custom is obsolete now that every married woman is by statute liable for debts and obligations as if she were a feme sole: Law Reform (Married Women and Tortfeasors) Act 1935 s 1(b).

16 *Chace v Box* (1699) 1 Ld Raym 484, 1 Eq Cas Abr 154 (as to the effect of partial advancement); *Jesson v Essington* (1703) cited from the decree book in *Bruin v Knott* (1843) 12 Sim 436 at 443, 452; *Blunt v Lack* (1856) 26 LJ Ch 148. This custom was abolished by 19 & 20 Vict c 94 (Administration of Intestates' Estates (1856)) s 1 (repealed).

17 *Ernley v Garth* (1490) 102 Selden Soc 96 at 99; YB Hil 5 Hen 7, f 10, pl 1; Pas 11 Hen 7, f 21, pl 8 (same case, misdated); Doctor and Student, 91 Selden Soc 71; Dyer 255 para 3. Most cities had a custom to devise land by will.

18 *Moss v Townsend* (1612) 1 Bulst 207. This is said to have been also the custom of Exeter: *Watbroke v Griffith* (1609) Moore KB 876.

19 *Luch's Case* (1618) Hob 247, Hetl 132, sub nom *Zuch's Case*, 1 Rolle Abr 550, Customs de London, (B) 3; cf *Knapp v Southworth* (1511) CP 40/996, m 340 (custom pleaded but not certified).

20 *Anon* (1623) 2 Rolle Rep 305. Cf *Langley v Chalke* (1481) CP 40/875, m 421 (alleged custom of London to bind infants over 7 years of age as apprentice and to chastise them); YB Pas 21 Edw 4, f 6, pl 17; *Kery v Bulwardyn* (1538) CP 40/1099, m 327 (alleged custom of London that indentures of apprenticeship are void unless enrolled in Guildhall).

21 *Plummer v Bentham* (1757) 1 Burr 248. This custom was partly abrogated by the Prescription Act 1832 s 3: *Salters' Co v Jay* (1842) 3 QB 109; *Truscott v Merchant Taylors' Co* (1856) 11 Exch 855, Ex Ch; and see PARA 646 post. However, it is not wholly abolished, and it may still operate to prevent a claim being set up on the basis of a lost grant: *Perry v Eames* [1891] 1 Ch 658 at 667 per Chitty J; *Bowring Services Ltd v Scottish Widows' Fund & Life Assurance Society* [1995] 1 EGLR 158 at 160. Cf *Bland v Moseley* (1587) KB 27/1302, m 253; cited, 9 Co Rep 58, where a similar custom of York was rejected on demurrer.

22 *City of London Case (Wagoner's Case)* (1610) 8 Co Rep 121b; *Fazakerely v Wiltshire* (1721) 1 Stra 462; *R v Chamberlain of London* (1725) 8 Mod Rep 267; *Adley v Whitstable Co* (1810) 17 Ves 315 at 322 per Lord Eldon LC; *Clark v Denton* (1830) 1 B & Ad 92; *Shaw v Poynter* (1834) 2 Ad & El 312. In such cases it was necessary to plead two customs of London, and the court would require the byelaw to pursue the particular custom which it followed. Thus the customs concerning the regulation of trade by companies could not be enlarged in restraint of trade: *Robinson v Groscourt* (1695) 5 Mod Rep 104 (byelaw requiring dancing masters to belong to the Company of Musicians held bad, since music was only part of their art); *Harrison v Godman* (1756) 1 Burr 12; *R v Tappenden* (1802) 3 East 186.

23 Eg that rectors of churches may make leases at a vestry: *Hastynges v Rogers* (1551) CP 40/1146, m 565 (certified by the recorder as a custom of the City). In *Ballard v Kydde* (1493) KB 27/929, m 98, it was alleged to be the custom of London that the churchwardens of every parish owned the pews and seats and could assign them at their pleasure; this met with a demurrer, but no judgment.

24 Two customs said to prevail throughout London are (1) that all churchwardens are elected by the parishioners; and (2) that the parson and churchwardens of each church are a corporation for the purpose of purchasing land: *Warner's Case* (1619) Cro Jac 532 (custom as to churchwardens laid as custom of parish); *R v Rice* (1697) 1 Ld Raym 138 per Holt CJ.

UPDATE

628 Other modes of proof; London

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER

(i) In general

629. Nature of rights in the land of another.

Rights may exist by custom which may affect the ownership of land and which may be enjoyed by persons having no estate or interest in the land[1]. Such rights partake of the nature of easements, and are sometimes called quasi easements[2]. Quasi easements are rights which are analogous to easements but are not strictly so, because some necessary element is wanting[3]. Easements proper must be rights capable of being granted to and released by the persons enjoying them[4], whereas customary rights are generally enjoyed by classes of persons the members of which are continually changing and continually fluctuating in number, so that they are incapable of taking a grant.

1 Such rights are also known as rights in alieno solo, and may be illustrated by the following examples: the inhabitants of a vill may have a right by custom to dance upon a particular close belonging to an individual (*Abbot v Weekly* (1665) 1 Lev 176); persons carrying on the trade of victuallers may by custom erect booths on another's land at the time of a particular fair (*Tyson v Smith* (1838) 9 Ad & El 406, Ex Ch); the inhabitants of a township may under a custom enjoy a right to enter another's land and take water from a spring (*Race v Ward* (1855) 4 E & B 702); the freemen of a city may enjoy a custom entitling them to hold horse races on land belonging to a private individual (*Mounsey v Ismay* (1865) 3 H & C 486); the inhabitants of a parish may erect a maypole and dance round it on the land of a private owner (*Hall v Nottingham* (1875) 1 ExD 1); the fishermen inhabitants of a parish may have a customary right of spreading and drying their nets on the land of a private owner (*Mercer v Denne* [1905] 2 Ch 538, CA). See also *Batten v Gedye* (1889) 41 ChD 507; and *Brocklebank v Thompson* [1903] 2 Ch 344 (cases relating to parishioners' rights of way to a parish church).

2 *Brocklebank v Thompson* [1903] 2 Ch 344 at 348 per Joyce J (customary churchway); *Constable v Nicholson* (1863) 14 CBNS 230 at 240 per Willes J.

3 The term quasi easement is not a strict legal term. It is used generally in a different sense as denoting the accommodation afforded by one tenement to another when both tenements are owned by the same person and where the accommodation thus afforded would have been an easement had the tenement affording the accommodation been owned by another person; see eg *Wheeldon v Burrows* (1879) 12 ChD 31 at 49, CA. Cf *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836 at 841, CA. The term was used in *Brocklebank v Thompson* [1903] 2 Ch 344 at 348 (principle of a grantor not derogating from his grant). As regards the implied grant or reservation of easements see EASEMENTS AND PROFITS A PRENDRE.

4 See eg *Mercer v Denne* [1905] 2 Ch 538 at 586, CA, per Cozens-Hardy J; *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 239, HL ('all prescription presupposes a grant'); *Lockwood v Wood* (1844) 6 QB 50 at 64; and see PARAS 604 note 4, 620 note 5 ante; and EASEMENTS AND PROFITS A PRENDRE.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(i) In general/630. Requisites for enforceability.

630. Requisites for enforceability.

In order that a right in the land of another[1] may validly be claimed under an alleged custom in favour of an undefined and fluctuating body of persons, it must be certain and reasonable, and must generally conform to the requirements of a valid custom already set out[2].

1 See PARA 629 ante.

2 *Broadbent v Wilks* (1742) Willes 360; *Carlyon v Lovering* (1857) 1 H & N 784 at 800 per Watson B. For the general requirements of a valid custom see PARAS 606-619 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(ii) Profits à Prendre/631. Profits cannot be claimed by custom.

(ii) Profits à Prendre

631. Profits cannot be claimed by custom.

If a right in the land of another amounts to a profit à prendre it cannot be claimed under an alleged custom; for no profit à prendre and therefore no right of common[1] can be claimed by custom[2], except in right of tenements formerly copyhold[3], and perhaps in certain mining localities[4]; nor can there be a right to a profit à prendre in an undefined and fluctuating body of persons[5].

1 Cf YB Hil 7 Edw 4, f 26, pl 3 per Danby CJ (the inhabitants of a vill may claim by usage a right to intercommon with another vill, 'for the ease of the tenants, for it is better for them to intercommon than to keep their beasts separately').

2 *Boteler v Bristow* (1475) YB Trin 15 Edw 4, f 29, pl 7 per Pigot sjt; *Gateward's Case* (1607) 6 Co Rep 59b; *Rockey v Huggens* (1628) Cro Car 220; *Davies' Case* (1688) 3 Mod Rep 246 (alleged custom for tenants of a manor to fowl in the warren of another); *Grimstead v Marlowe* (1792) 4 Term Rep 717 at 718 (alleged custom for the inhabitants of a parish to have common of pasture); *Hardy v Hollyday* (1731) cited in *Grimstead v Marlowe* supra at 718-719, where it is dated 7 Geo 3 but is said to be from a note by Lord King (who died in 1734); *Blewett v Tregonning* (1835) 3 Ad & El 554 at 575 per Patteson J (alleged custom for the inhabitants of a parish to enter a particular close and carry away reasonable quantities of sand drifted on to the land by the wind, held bad, because drifted sand becomes part of the freehold of the close); *Clayton v Corby* (1843) 5 QB 415 (claim to take clay from another's land for making bricks); *Lloyd v Jones* (1848) 6 CB 81 at 89 per Wilde CJ (alleged custom to take fish from a river); *Padwick v Knight* (1852) 7 Exch 854 (alleged custom for parish officials to take gravel to mend highways); *Bland v Lipscombe* (1854) 4 E & B 713n (alleged custom for the inhabitants of a parish to fish in private water); *Race v Ward* (1855) 4 E & B 702 (customary right to take water from a spring, held not to be a profit à prendre); *A-G v Mathias* (1858) 4 K & J 579 at 590-591 per Byles J; *Re Hainault Forest Act 1858* (1861) 9 CBNS 648; *Constable v Nicholson* (1863) 14 CBNS 230 at 239-240, 242 (claim by the inhabitants of a township to take gravel, sand and other material from the sea shore between high and low water mark in order to repair highways; followed in *Hough v Clark and Hall* (1907) 23 TLR 682); *Knight v King* (1869) 20 LT 494 (alleged custom for tenants to have rights of common); *Pitts v Kingsbridge Highway*

Board (1871) 19 WR 884 (claim by the inhabitants of a parish to take shingle from private property in order to repair parish highways); *London City Sewers Comrs v Glasse* (1872) 7 Ch App 456 at 465 per James LJ; *Allgood v Gibson* (1876) 34 LT 883 at 884 (alleged custom for the inhabitants of a manor to have a common of fishery in the lord's water); *Chilton v London Corpn* (1878) 7 ChD 735 (alleged custom for the inhabitants of a parish to lop branches of trees growing on the waste lands of a manor for use as fuel); *Lord Rivers v Adams* (1878) 3 ExD 361 (alleged custom for inhabitants of a parish to cut and take fagots or underwood); *Earl De la Warr v Miles* (1881) 17 ChD 535 at 577, CA; *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL (a claim of right in the free inhabitants of a borough to fish for oysters could not be claimed by custom, but was upheld as arising from a trust declared as a condition of a grant of a several fishery to the corporation; distinguished in *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA; see PARA 623 note 3 ante); *Tilbury v Silva* (1890) 45 ChD 98 at 107, CA (claim by inhabitants to a right of fishing); *Chesterfield v Fountaine* (1895) cited [1908] 1 Ch 243 n; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 163 (alleged custom for the inhabitants of certain manors, being wild fowlers, to shoot wild fowl on another's land); *Mitcham Common Conservators v Banks* (1912) 76 JP 413 at 414 per Swinfen Eady J (alleged custom for inhabitants of Mitcham to pasture on Mitcham Common); *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 482, [1967] 1 All ER 833 at 851, CA, per Winn LJ (though it was questioned by Russell LJ in the same case whether the right to take sea coal which had had no previous owner was a profit for this purpose); and see PARA 612 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq; EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 256. In *Bond's Case* (1639) March 16, a custom to take rushes to strew the floor of a church was said to be good, but this is of doubtful authority: *Constable v Nicholson* (1863) 14 CBNS 230 at 237 per Willes J. As to the application of the rule stated in the text to common of piscary see COMMONS vol 13 (2009) PARA 461 et seq.

3 See PARAS 642, 644 post.

4 For these special mining customs in Cornwall, Derbyshire and elsewhere see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 588 et seq, 593 et seq, 608 et seq.

5 *London City Sewers Comrs v Glasse* (1872) 7 Ch App 456 at 465 per James LJ; *Keren Kayemeth Leisrael Ltd v Arab Mazareeb Tribe* [1943] 2 All ER 570, PC; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA (see PARA 632 note 7 post).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(ii) Profits à Prendre/632. Fluctuating bodies.

632. Fluctuating bodies.

A profit à prendre cannot be supported by custom in favour of an indefinite and fluctuating body of persons because, were such a right recognised, the result would be that the subject matter of the right would soon become exhausted[1], and the owner of the land subject to the right would be wholly deprived of the ordinary incidents of ownership[2]. No release of the rights could ever be obtained from such bodies of persons for, from their very nature, they would be incapable of granting a release, and thus the land would continue subject to an unreasonable burden in perpetuity[3]. Moreover, the number of persons composing such a body as the inhabitants of a particular district might increase to any extent and so cause the destruction of the subject matter of the custom[4]. An alleged custom which would destroy the subject matter of the right would be unreasonable; and no unreasonable custom can exist[5].

Nevertheless, although such rights cannot be claimed under a local custom, or by prescription, if they have in fact been enjoyed for a long time it may be possible to uphold them either under a presumed or actual grant from the Crown which has the effect of incorporating the beneficiary class[6], or by presuming a charitable trust of uncertain origin[7]. Failing all these possibilities, however, the courts will not presume a lost Act of Parliament[8].

1 YB Mich 8 Edw 4, f 18, pl 30 per Littleton J; *Race v Ward* (1855) 4 E & B 702 at 705 per Lord Campbell CJ.

2 *A-G v Mathias* (1858) 4 K & J 579 at 591 per Byles J ('It is an elementary rule of law that a profit à prendre in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons like the inhabitants of a

parish or other district, who could not release the right'). For other reasons for the rule in the text see *Gateward's Case* (1607) 6 Co Rep 59b at 60a; *Lord Rivers v Adams* (1878) 3 ExD 361 at 364 per Kelly CB.

3 *Lord Rivers v Adams* (1878) 3 ExD 361 at 364 per Kelly CB; and see *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 163 per Parker J; *Davies' Case* (1688) 3 Mod Rep 246.

4 As between the lord of a manor and his tenants, however, there may be customs as to the taking of timber and minerals: see PARAS 643-644 post.

5 Such an extensive right may exist by reason of grant or prescription, but not by virtue of custom: *Chesterfield v Fountaine* (1895), cited [1908] 1 Ch 243n per Wills J. See also PARA 612 note 2 ante.

6 YB Hil 7 Edw 4, f 26, pl 3; *Anon* (1526) YB Mich 18 Hen 8, f 1, pl 5 per Fitzherbert J ('The inhabitants may not prescribe without showing that they have an incorporation by the same name from time immemorial'); *Willingale v Maitland* (1866) LR 3 Eq 103 (implied incorporation of inhabitants by alleged royal grant for labouring and poor people to cut boughs and branches); *Chilton v London Corpn* (1878) 7 ChD 735 at 743 per Jessel MR (who pointed out that the undated charter of Elizabeth I pleaded in *Willingale v Maitland*, and confessed by the demurrer, was wholly fictitious); *Lord Rivers v Adams* (1878) 3 ExD 361 at 365 per Kelly CB; *Re Co or Fraternity of Free Fishermen of Faversham* (1887) 36 ChD 329, CA; *Harris v Earl of Chesterfield* [1911] AC 623, HL (where the House declined to presume a lost incorporation). However, an unrecorded incorporation will not be presumed unless the body has in fact acted as a corporation: *Lord Rivers v Adams* supra. Cf *Duchy of Cornwall Case* (1425) YB Trin 4 Hen 6, f 29, pl 17 (avowry upon the inhabitants of an unincorporated vill for rent payable to the duchy, held good).

7 *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL (cited in para 631 note 2 ante); *Mitcham Common Conservators v Banks* (1912) 76 JP 413 at 414 per Swinfen Eady J (though no such right was established in the instant case); *Peggs v Lamb* [1994] Ch 172, [1994] 2 All ER 15 (where immemorial rights, presumed to derive from charitable trusts, were altered by a cy-près scheme to enlarge the class of persons entitled) and see *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA. Cf *R v Doncaster Metropolitan Borough Council* (1989) 57 P & CR 1 (immemorial rights of recreation on common enjoyed by public at large).

8 *Weekly v Wildman* (1698) 1 Ld Raym 405 at 407 per Treby CJ; *Chilton v London Corpn* (1878) 7 ChD 735 at 740 per Jessel MR; cf *Cocksedge v Fanshaw* (1779) 1 Doug KB 119 at 133 per Lord Mansfield CJ, contra.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(iii) Rights of Entry for Recreation or for taking Water/633. Rights of recreation.

(iii) Rights of Entry for Recreation or for taking Water

633. Rights of recreation.

A large proportion of the rights existing by custom in another's land are rights of entering on that person's land and of using it for the purposes of recreation[1]. Those rights may be claimed by custom by all the inhabitants of a parish[2], township[3], town[4], vill[5], borough[6], or manor[7], or by the freemen of a city[8]. A right to enter another's land for the purposes of recreation under an alleged custom can only exist if it is in favour of a particular class of persons. Such a right cannot exist by custom in favour of the public in general[9], nor in favour of all persons who for the time being happen to be in a particular district[10].

The custom must be reasonably exercised by those entitled to it. Thus it is not reasonable to spoil cut hay in the course of recreation[11]. And where there is a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year, this will not justify any member of this class in exercising such a privilege while the corn is growing on the land; for a seasonable time does not mean any time convenient to the person using the right, so as to extend to every period of good weather when it would be seasonable to ride out for the purposes of health[12].

The public has no right at common law to resort to open spaces for recreation; but numerous local and public Acts of Parliament have provided for public recreation in particular areas[13].

1 For possible legal limits upon a right of recreation see the discussion in *R v Doncaster Metropolitan Borough Council* (1989) 57 P C & R 1 (where the rights in question were exercised by the public at large and had therefore to be based on a trust rather than on custom). The rights claimed in that case included jogging, walking about, and picnicking.

2 *Fitch v Rawling* (1795) 2 Hy Bl 393 (custom for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in a particular close belonging to a private owner at all seasonable times of the year at their free will and pleasure); *Hall v Nottingham* (1875) 1 ExD 1 (custom for the inhabitants of a parish to enter upon certain land to erect a maypole, and dance round it and otherwise enjoy any lawful and innocent recreation at any time in the year on the land); and see *Warrick v Queen's College, Oxford* (1870) LR 10 Eq 105 at 129 (use of village green as a place of pastime by the inhabitants of a parish). As to certainty of locality see PARA 616 ante. As to whether a right of boating on a river for the purposes of recreation may be claimed under a custom see *Bourke v Davis* (1889) 44 ChD 110 at 120 per Kay J (where, however, no such custom was claimed). A right to cross the sea-shore in person or with a bathing machine, in order to bathe in the sea, is capable of being claimed by local custom: *Blundell v Catterall* (1821) 5 B & Ald 268 at 306 per Bayley J.

3 *Race v Ward* (1855) 4 E & B 702.

4 *Abercromby v Fermoy Town Comrs* [1900] 1 IR 302; and see *Millechamp v Johnson* (1746) Willes 205n (b) (in that case, the particular custom was held bad; but this was upon the ground that the right which it was alleged to give, namely a right for all the inhabitants of a particular town to enjoy the liberty of playing at any rural sports, was too general and uncertain).

5 *Abbot v Weekly* (1665) 1 Lev 176 (custom for the inhabitants of a vill to dance in a particular close at all times of the year at their free will for their recreation).

6 *New Windsor Corpn v Mellor* [1974] 2 All ER 510; affd [1975] Ch 380, [1975] 3 All ER 44, CA. In this case the land in question had been registered as a town or village green under the Commons Registration Act 1965 and the court dismissed an appeal by way of case stated under s 18; as to registration under the Act and appeal by way of case stated; see COMMONS vol 13 (2009) PARAS 425, 508 et seq.

7 *Coote v Ford* (1900) 83 LT 482 (alleged copyhold custom to kill rabbits on the manorial waste, held not unreasonable, but on the evidence not established).

8 *Mounsey v Ismay* (1865) 3 H & C 486 (custom for the freemen of Carlisle to enter and hold horse races on the land of an individual owner).

9 *Bourke v Davis* (1889) 44 ChD 110 at 120; see also *Earl of Coventry v Willes* (1863) 12 WR 127 at 128 per Cockburn CJ (ineffectual claim of a customary right for the public to enter Newmarket Heath at their free will and pleasure and to remain there a reasonable time for the purpose of witnessing horse races); *Eton College v O'Brien's Amusements Ltd* (1931) Times, 21 May (alleged right of the public of recreation over the Brocas, Eton Wick). But see *R v Doncaster Metropolitan Borough Council* (1987) 57 P & CR 1 (immemorial right of public recreation attributed to a charitable trust).

10 *Fitch v Rawling* (1795) 2 Hy Bl 393.

11 *Fitch v Fitch* (1797) 2 Esp 543 (where a custom was alleged for the inhabitants of Steeple Bumpstead to play all lawful games at all times on the plaintiff's close). The remedy in this case was an action of trespass against the person abusing the custom.

12 *Bell v Wardell* (1740) Willes 202 at 205 per Willes CJ. Cf *Fitch v Fitch* (1797) 2 Esp 543, cited in note 11 supra, where the custom was to play games at 'all times' of the year.

13 See OPEN SPACES AND COUNTRYSIDE.

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634. Modern forms of recreation.

When a right of recreation by exercising and playing at games, sports, and pastimes exists under a custom in favour of a class of persons, this right is not confined to the kinds of games, sports, pastimes, and recreations existing at the commencement of legal memory[1]. Thus, a right for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes on another's land will justify an inhabitant playing cricket on the land[2], although it is reasonably certain that cricket was unknown until long after the time of Richard I[3].

1 Ie 1189: see PARA 621 ante. Many forms of sport, such as ball games, were treated as illegal at various periods of history as tending to promote idleness or disorder (see, eg, 12 Ric 2 c 6 (repealed). In Brit Lib MS Add 42077, f 22r, there is a precedent of an indictment of 1485 for playing quoits contary to the custom of the realm prohibiting unlawful games, namely football and hand-throwing). But that circumstance has not been treated in the reported cases as interrupting the continuity of user with respect to the range of games which may be played under such a custom. Provided some lawful games have been or may be presumed to have been played since 1189, the custom carries with it all games that are lawful at any particular time.

2 *Fitch v Rawling* (1795) 2 Hy Bl 393. It has been held that the custom will even extend to the incidents of such games, as, for instance, the pitching of a cricket tent: *Lancashire v Hunt* (1894) 10 TLR 310 at 312, 448, affd without reference to this point 11 TLR 49, CA.

3 *Mercer v Denne* [1904] 2 Ch 534 at 553 per Farwell J; on appeal [1905] 2 Ch 538 at 581, CA. This refers to *Fitch v Rawling* (1795) 2 Hy Bl 393, in which the point was not argued. Cf *Paterson v Provost of St Andrew's* (1881) 6 App Cas 833, HL, where it was accepted without argument that the playing of golf on St Andrew's links was correctly laid as immemorial; as to which see also *Dempster v Cleghorn* (1813) 2 Dow App Cas 40. See also *A-G v Wright* [1897] 2 QB 318 at 323, CA, per AL Smith LJ (custom as to boats may extend to yachts).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(iii) Rights of Entry for Recreation or for taking Water/635. Right of taking water.

635. Right of taking water.

A right may exist by custom whereby the persons who enjoy the right are entitled to enter upon the land of another person and to take water from the land[1]. Subject to the statutory provisions relating to control of the abstraction and impounding of water[2], such a right may be enjoyed by fluctuating and undefined classes of persons like the inhabitants of a parish[3], township[4], district[5], or village[6], and may bestow a right of taking water lying naturally upon the land[7], water issuing from a well or spring upon the land[8], water falling from a spout[9], or water flowing over the land[10], or even water falling from a spout in a public highway[11]. The right to take water from the land of another person, whether the water is issuing from the land or is lying on it or flowing over it, is not regarded as a right to a product of the soil or part of the soil; and for this reason the right is not a right to a profit à prendre, which cannot be claimed by custom[12], nor is it a right of property[13], but is in the nature of an easement[14].

In most, if not all, of the reported cases dealing with this right the water taken from the land of another person under a custom has been water required and utilised for some particular purpose and in a particular manner[15]; but as the right is in the nature of an easement and not a profit à prendre there seems to be no necessity that it should be so limited[16].

1 *Race v Ward* (1855) 4 E & B 702 (custom for all the inhabitants of a township to take water from a well for domestic purposes); *Manning v Wasdale* (1836) 5 Ad & El 758 at 764 per Patteson J (right to water cattle and take water for culinary and other domestic purposes).

2 See the Water Resources Act 1991; and WATER AND WATERWAYS vol 100 (2009) PARA 214 et seq.

3 *Manning v Wasdale* (1836) 5 Ad & El 758 (a case of prescription).

4 *Race v Ward* (1855) 4 E & B 702.

5 *Harrop v Hirst* (1868) LR 4 Exch 43 ('district of Tamewater', within a parish, said in the judgment to be a street); no objection was taken here on the grounds of uncertainty, but cf para 616 ante.

6 *Smith v Archibald* (1880) 5 App Cas 489 at 512-513, HL, per Lord Blackburn (a claim by the inhabitants of a village, which was not a separate borough or parish, to draw water from a well).

7 *Manning v Wasdale* (1836) 5 Ad & El 758 (in which the distinction between standing and running water was not explored); apparently approved in in *Race v Ward* (1855) 4 E & B 702 at 708, where Lord Campbell CJ said that water was not the subject of ownership unless placed in a cistern or vessel (though in the case at bar the water came from a spring, which his lordship said could be treated as running water). The dictum of Jenney in *Boteler v Bristow* (1475) YB Trin 15 Edw 4, f 29, pl 7, cited in *Race v Ward* supra at 710, as being in this category, in fact concerned a spring ('fount' in law French).

8 See, for instance, *Race v Ward* (1855) 4 E & B 702 (custom to take water from a spring or well upon a certain close belonging to an individual owner).

9 *Harrop v Hirst* (1868) LR 4 Exch 43 (customary right for the inhabitants of a district to take water from a spout); and see note 7 supra.

10 *Gaved v Martyn* (1865) 19 CBNS 732 (the right of tin bounders in Cornwall to take water flowing over their tin bounds).

11 *Harrop v Hirst* (1868) LR 4 Exch 43.

12 See PARAS 631-632 ante.

13 *Smith v Archibald* (1880) 5 App Cas 489 at 512, HL, per Lord Blackburn (referring obiter to English law); cf *Weekly v Wildman* (1698) 1 Ld Raym 405 at 407, where Blencowe J said, 'Inhabitants may have a custom to have pot water, which is an interest, and not barely an easement', but Powell J immediately denied this and said it was only an easement.

14 *Manning v Wasdale* (1836) 5 Ad & El 758 at 763 per Lord Denman CJ, and at 764 per Patteson and Williams JJ; and see *Race v Ward* (1855) 4 E & B 702.

15 Thus in *Manning v Wasdale* (1836) 5 Ad & El 758, the water was for 'culinary and other domestic purposes', and for 'washing and watering cattle'; in *Race v Ward* (1855) 4 E & B 702, the water was to be consumed in the inhabitants' dwelling houses, and the pleas were amended upon the argument by inserting the words 'for domestic purposes'; in *Harrop v Hirst* (1868) LR 4 Exch 43, the water was 'for culinary and other domestic purposes to be used in' the inhabitants' dwelling houses, 'for the more convenient use and occupation thereof'; in *Boteler v Bristow* (1475) YB 15 Edw 4, fo 29, pl 7 per Jenney, the water was 'pur faire manger et boyer et touts necessaries'; in some of the older cases the water was said to be for the purposes of 'pot water'; see *Weekly v Wildman* (1698) 1 Ld Raym 405 at 407 per Blencowe J.

16 *Smith v Archibald* (1880) 5 App Cas 489 at 512, HL, per Lord Blackburn, in which case no special purposes were defined for which the water was to be used. See generally, as to water rights, EASEMENTS AND PROFITS A PRENDRE; WATER AND WATERWAYS.

UPDATE

635-636 Right of taking water, In general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

(iv) Rights of Way

636. In general.

A right of way may exist over the land of another by virtue of a custom. Rights of way existing by custom are to be distinguished both from public rights of way, or highways, which arise either by statute or from the dedication of the soil by its owners to the use of the public[1], and from private rights of way which are easements properly so called[2]. A customary right of way may be enjoyed by any member of a fluctuating body or class of persons provided that body or class is itself certain[3]. It is regarded as a private right of way in so much as it exists only for the benefit of a limited section of the public, and it cannot be used under a claim of right by any person who is not a member of that body or class in whose favour it exists[4]. Rights of way of this kind may exist in favour of the inhabitants of a parish[5] or a town[6], or probably of any other district sufficiently well defined to be the local area of any customary right[7].

1 Certain local authorities have compulsory powers for the creation of footpaths and bridleways over land in their area by means of 'public path creation orders': see the Highways Act 1980 s 26; and HIGHWAYS, STREET AND BRIDGES vol 21 (2004 Reissue) PARA 586.

2 As to private rights of way see EASEMENTS AND PROFITS A PRENDRE.

3 See PARA 617 ante; see also *Goodday v Michell* (1595) Cro Eliz 441; *Taylor v Devey* (1837) 7 Ad & El 409; *Grant v Kearney* (1823) 12 Price 773 (cases of customary rights of perambulation); *Derry v Sanders* [1919] 1 KB 223, CA.

4 *Brocklebank v Thompson* [1903] 2 Ch 344 at 348; *Austin's Case* (1672) 1 Vent 189 per Hale CJ ('If a way lead to a market, and were a way for all travellers, and did communicate with a great road, etc, it is a highway; but if it lead only to a church, to a private house or village, or to fields, there it is a private way').

5 *Brocklebank v Thompson* [1903] 2 Ch 344; *Batten v Gedye* (1889) 41 ChD 507.

6 *Gateward's Case* (1607) 6 Co Rep 59b.

7 See PARA 616 ante.

UPDATE

635-636 Right of taking water, In general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

637. Churchways and other rights of way.

Customary rights of way must in the nature of things provide some form of access required by the whole class of persons in whose favour they exist, rather than access to a particular piece of private property. The commonest type met with in the reports is a churchway. A customary churchway is a right of way in favour of the parishioners to go to and from the parish church over the land of a private individual owner, and is enjoyed by the parishioners as a means of access to the parish church[1]. Such a way, limited to the parishioners, can only exist by custom, and no landowner can dedicate a road to the public with only such rights as existed by custom over a churchway[2]. As a customary way it must arise from user from time immemorial and cannot now be created anew[3]. A right of way to a parish church, however, is not necessarily a customary right of way belonging to the parishioners, but may be a public highway[4]. Prima facie a custom in reference to a way to a parish church is a parochial custom in favour of the parishioners; and a customary churchway not for the use and benefit of the parishioners at large would be rare[5].

Other instances of customary rights of way are those which give access to a market[6], or to common fields[7], or to a common spring of water[8], or to a ferry[9], or which link two public highways[10].

1 As to churchways of this kind see *Boteler v Bristow* (1475) YB Trin 15 Edw 4, f 29, pl 7 per Bryan CJ; YB Pas 18 Edw 4, f 3, pl 15; *Goodday v Michell* (1595) Cro Eliz 441; *Bond's Case* (1639) March 16; *Thrower's Case* (1672) 1 Vent 208; *Batten v Gedye* (1889) 41 ChD 507; *Brocklebank v Thompson* [1903] 2 Ch 344; *Farquhar v Newbury RDC* [1909] 1 Ch 12, CA; Bac Abr, Highways (A); 3 Cru Dig (4th Edn) 85-86; see also *Gateward's Case* (1607) 6 Co Rep 59b; *Walter v Mountague and Lamprell* (1836) 1 Curt 253; *Austin's Case* (1672) 1 Vent 189; Co Litt 110b. In *Batten v Gedye* supra it was held that a customary churchway could be claimed over the churchyard, but in such case the jurisdiction belonged to the ecclesiastical court.

2 *Farquhar v Newbury RDC* [1909] 1 Ch 12 at 16, CA, per Cozens-Hardy MR. See *Poole v Huskinson* (1843) 11 M & W 827; and HIGHWAYS, STREET AND BRIDGES.

3 *Farquhar v Newbury RDC* [1909] 1 Ch 12 at 19, CA, per Fletcher Moulton LJ.

4 See *Thrower's Case* (1672) 1 Vent 208.

5 *Brocklebank v Thompson* [1903] 2 Ch 344 at 354 (custom established in favour of parishioners, but not as a manorial custom).

6 *Gateward's Case* (1607) 6 Co Rep 59b; see also Co Litt 110b; *Pain v Patrick* (1691) 3 Mod Rep 289 at 294.

7 *Austin's Case* (1672) 1 Vent 189 per Hale CJ.

8 *Goodday v Michell* (1595) Cro Eliz 441 (common fountain); *Race v Ward* (1855) 4 E & B 702 (customary right of way to a spring, with the ancillary right of taking water from it).

9 See *Pain v Patrick* (1691) 3 Mod 289 at 294 (though the ferry and the right of way in this case seem to have been available to the public at large: Carth 191).

10 *Fineux v Hovenden* (1599) Cro Eliz 664 (custom for the inhabitants of Canterbury to have a way connecting two streets).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(iv) Rights of Way/638. Obstruction.

638. Obstruction.

An indictment will not lie for the obstruction of a right of way which exists by custom, since it is not a wrong done to all liege subjects[1]; but any one of the persons composing the body or class

in whose favour the customary right exists may maintain an action for nuisance if the way is obstructed, without showing special damage[2].

1 *R v Thrower* (1672) 3 Keb 28, 1 Vent 208, where, speaking of a way to a church, Hale CJ said (1 Vent 208): 'If this were alleged to be *communis via pedestris ad ecclesiam pro parochianis* (ie a common footpath to the church for the parishioners) the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits'; the way in this case was, however, held to be a highway, and not a customary right of way.

2 *Brocklebank v Thompson* [1903] 2 Ch 344 at 348 per Joyce J.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(iv) Rights of Way/639. Repair.

639. Repair.

A customary right of way, not being a public right of way, is prima facie repairable by the class or body of persons in whose favour the right exists[1].

1 Thus in *Austin's Case* (1672) 1 Vent 189, Hale CJ said: 'If it be a public way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet, or sometimes by a particular person'.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(5) CUSTOMARY RIGHTS IN THE LAND OF ANOTHER/(iv) Rights of Way/640. Perambulations.

640. Perambulations.

Rights incident to the perambulation of a district by inhabitants at certain times of the year, for the purpose of preserving the notoriety of the boundaries of the district, form a distinct class of customary rights of way[1]. These rights of perambulation are peculiar in themselves, in as much as they are only exercised on rare occasions, sometimes only once a year[2] or once every few years[3]. Like other customary rights they must be shown to have existed either actually or presumptively from time immemorial[4], and may exist in favour of the inhabitants of a parish[5], manor[6], liberty[7], hundred[8], or other similar district. The right to perambulate parochial boundaries and to enter private property for that purpose, and to remove obstructions which might prevent this from being done, was at one time usual in all parts of England[9]; but a customary right to perambulate boundaries cannot confer a right to enter any house unless it is necessary to enter it for some purpose necessarily connected with the perambulation[10].

1 For instances of customary rights of way incident to perambulation see *Goodday v Michell* (1595) Cro Eliz 441, Owen 71; *Taylor v Devey* (1837) 7 Ad & El 409. For a claim to take refreshment in the form of bread and ale in houses during the perambulation see *Uffington's Case* (1615) 2 Rolle Abr 287 para (F) 49.

2 As, for instance, in *Goodday v Michell* (1595) Cro Eliz 441, Co Ent 650b (customary right of perambulation by the parishioners in Rogation Week); *Grant v Kearney* (1823) 12 Price 773 (every Ascension Day).

3 *Taylor v Devey* (1837) 7 Ad & El 409 (Thursday in Rogation Week in every third year).

4 *Grant v Kearney* (1823) 12 Price 773 at 792 per Hullock B.

5 *Goodday v Michell* (1595) Cro Eliz 441.

6 *Lord Chesterfield v Harris* [1911] AC 623, HL.

7 *Grant v Kearney* (1823) 12 Price 773 (a claim to perambulate the boundaries of the Liberty of the Rolls, and for that purpose to pass through the kitchen garden of Lincoln's Inn).

8 *A-G v Wall* (1760) 4 Bro Parl Cas 665; *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 407, CA; affd [1911] AC 623, HL.

9 *Taylor v Devey* (1837) 7 Ad & El 409 at 415 per Lord Denman CJ ('a notorious custom, in all parts of England'). The number of cases in which it has been claimed as a local custom suggest that it is not a common law right; however, even if it is, a local custom must be shown in order to establish the bounds in the particular case.

10 See *Taylor v Devey* (1837) 7 Ad & El 409 at 416 per Lord Denman CJ (in this case a custom was alleged for the parishioners to enter and pass through a house in the parish when perambulating the boundaries of the parish; but it was not pleaded that the house was on the boundary or that it was necessary to pass through the house when following the boundary; upon this ground the custom as pleaded was held invalid in law).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(6) MANORIAL CUSTOMS/641. Manorial customs; in general.

(6) MANORIAL CUSTOMS

641. Manorial customs; in general.

The most prevalent customs met with in modern practice, at any rate until 1926, have been those obtaining within manors[1].

The rights, powers and duties of both the lord and the tenants, freehold and copyhold, of a manor were governed to a considerable extent by ancient laws or special customs[2], which differed from the general common law of England, and frequently varied in different manors. These customs regulated the mode of enjoyment of the lands within the manor, the power and mode by which manorial lands could be alienated, and the course of devolution of those lands upon the death of the owner. They were survivals of ancient local common law, which the general common law and statute law had recognised as enforceable and had left untouched. They were of equal authority with the general common law of England[3], and were equally binding upon the court[4].

1 For the law relating to manors in general see PARA 695 et seq post. Some of the rights of manorial lords (such as the right to hold a manorial court, or a market, or to take waifs and strays, or wreck) are liberties or franchises, and are therefore only capable of being claimed by prescription or royal grant and not through custom. For this distinction see PARA 603 ante.

2 The efficacy of manorial customs depends upon the doctrine that every manor must have existed time out of mind and cannot be created (eg by royal grant) within the time of legal memory: see PARA 698 note 1 post.

3 *Peachy v Duke of Somerset* (1721) 1 Stra 447. See also PARA 601 ante.

4 *Re Smart, Smart v Smart* (1881) 18 ChD 165 at 170. Customs as to modes of assurance and descent, and customs relating to copyhold tenure, have all disappeared with the disappearance of copyhold tenure (see generally para 643 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq); but manorial customs may still be of importance in connection with the tenant's commonable rights, the rights of the lord or the tenant to mines and minerals, or the lord's sporting rights, all of which were preserved on the general statutory enfranchisement (see REAL PROPERTY vol 39(2) (Reissue) PARA 35); although the lord's preserved rights might be extinguished by agreement (as to extinguishment see the Law of Property Act 1922 ss 138-143 (repealed)).

642. Copyhold.

Copyhold[1] originated in base or villein tenure, under which land was held at the will of the lord of the manor, but both the common law and equity came in the sixteenth century to protect the rights of copyholders in accordance with the manorial customs under which they held[2]. The freehold was deemed to be in the lord, but the tenant had an estate, which could be an estate of inheritance, 'according to the custom of the manor'. Although the tenant was not seised, he had sufficient possession to maintain an action of trespass or ejectment, and his interest was eventually treated as a species of 'real property'[3]. The effect of recognising copyhold as a tenure protected by the common law was that copyhold customs became subject to rules which differ to some extent from those relating to other local customs.

All the rules affecting lords and tenants in respect of copyhold tenements were in theory derived from the customs of each individual manor[4]. But some of these rules came to be regarded as universal, and so, contrary to the normal principles governing local custom, they were noticed by the common law judges without being pleaded or proved[5]. This is still the case since the abolition of copyholds, to the extent that manorial customs have been saved. In addition to these general customs are particular customs which obtain only in some manors[6], and these, however widespread[7], have to be pleaded and proved in the same way as other local customs[8]. Particular customs necessarily differ from general copyhold customs, and are not to be rejected merely on grounds of inconsistency with the general law[9], though in some cases a particular custom may be rejected if directly contrary to a general copyhold custom[10]. A general custom may attach to a particular custom, in the sense that some rules are universally noticed wherever a particular custom of a well known type is found to exist[11].

Copyhold and other manorial customs are subject to the same tests for validity as other local customs. Nevertheless, because of the origin of copyhold in villeinage, it has been said to be almost impossible to reject a copyhold custom as being unreasonable[12], and the courts have applied a more flexible standard of reasonableness than in the case of freehold tenures[13], albeit not always in favour of the lord. There were widespread customary rules of inheritance differing from those of the common law[14], and estates of a kind not recognised at common law, such as perpetually renewable life estates[15], and estates limited to multiple life tenants to hold successively[16]. A major difference from freehold was that a copyholder might be entitled by custom to a profit à prendre[17], whereas this is not permitted in the case of freehold[18]; and this distinction still obtains in respect of rights of common and mineral rights, since in these cases the former copyhold customs have been preserved by legislation. However, a tenant for life may not assert a copyhold custom permitting him to waste the inheritance[19]. Another major difference from freehold is that copyholds were not conveyed by livery or grant but by surrender and admittance in the manorial court[20].

The rule as to immemorial existence is not applied strictly in the case of copyhold. As a matter of history, it is certain that copyhold tenure did not exist as such in 1189, before the introduction of court rolls, and yet this is no longer an objection to its presumed immemorial existence[21], since it can be regarded for this purpose as a continuation of villeinage tenure. There was likewise no objection on this ground to uses and trusts of copyhold land, and copyhold entails[22], which the courts accepted as immemorial without inquiring too exactly into legal history. Proof of a manorial custom is generally made by searching out precedents in the court rolls[23], and one instance may suffice[24]. Nevertheless, since manorial courts are not courts of record, the rolls are not legally conclusive. Use may also be made of custumals or customaries[25], which are written surveys of the customs of a particular manor; where there is such a record, provided that it purports to be comprehensive[26], omission of an alleged custom from the custumal may be conclusive against its existence[27].

1 Originally called tenancy by copy of court roll (see YB Mich 42 Edw 3, f 25, pl 9), because the tenant's instrument of title was a copy of the entry on the manorial court roll recording his admittance: Littleton's Tenures s 75; Co Litt 57b, 58a.

2 See CM Gray *Copyhold, Equity and the Common Law* (1963). For the law of copyholds in general before 1926 see Scriven on Copyholds (7th Edn) and Watkins on Copyholds (4th Edn), whose value as authorities is acknowledged in *Ecclesiastical Comrs for England v Parr* [1894] 2 QB 420 at 428, CA, per Lord Esher MR.

3 *Doe d Clarke v Ludlam* (1831) 7 Bing 275; *Reeves v Baker* (1854) 18 Beav 372 at 382 per Romilly MR; *Torre v Browne* (1855) 5 HL Cas 555 at 571 per Lord Cranworth LC; *Re Sirett* [1968] 3 All ER 186 at 192, [1969] 1 WLR 60 at 66 per Buckley J.

4 See *Brown's Case* (1581) 4 Co Rep 21a ('the custom of the manor is the soul and life of copyhold estates').

5 Eg the usual mode of conveyance by surrender and admittance: Littleton's Tenures s 74; *Combes's Case* (1613) 9 Co Rep 75a. On the other hand, a special mode of surrender, eg by delivery of a rod (tenancy by the verge), or by surrender out of court to a bailiff or reeve, or to two other tenants, had to be supported by a special custom: Littleton's Tenures ss 78, 79; Co Litt 59a; *Combes's Case* supra at 76a; *Page v Smith* (1696) 3 Salk 100; *Turner v Benny* (1670) 1 Mod 61; *Doe d Cawthorn v Mee* (1833) 4 B & Ad 617; *Doe d Stilwell v Mellersh* (1836) 5 Ad & El 540 (surrender to clerk of castle). Another example of a 'general custom of England' was that which permitted a copyholder to make a lease for one year sufficient to support an action of ejectment: *Melwich v Luter* (1588) 4 Co Rep 26a; Co Litt (19th Edn) 59a note (4).

6 *Dudfield v Andrews* (1689) 1 Salk 184 ('There are two sorts of customs, viz general throughout all manors, which the court takes notice of; particular, which must be pleaded').

7 The custom of neighbouring manors is not, in such cases, evidence of a special custom in any particular manor: *Ratcliffe v Chaplin* (1610) 4 Leon 242; *Dean and Chapter of Ely v Warren* (1741) 2 Atk 189; *Furneaux v Hutchins* (1778) 2 Cowp 807; *Roe d Beebee v Parker* (1792) 5 Term Rep 26 at 30; *Marquis of Anglesey v Lord Hatherton* (1842) 10 M & W 218. It is otherwise if the custom is alleged to obtain in a region such as a county: *Champian v Atkinson* (1672) 3 Keb 90; *Ruding v Newell* (1733) 2 Stra 957 (border law); *Duke of Somerset v France* (1725) Fort 44, 1 Stra 659 (custom of tenant-right prevailing in three northern counties but pleaded as a custom of the manor in question); *Stanley v White* (1811) 14 East 332 at 338, 341 per Lord Ellenborough CJ; *R v Ellis* (1813) 1 M & S 652 at 662 per Lord Ellenborough CJ (referring to a custom of a district of manors; but this was merely a usage of the country which explained a grant); *Rowe v Brenton* (1828) 8 B & C 737 at 758 (stannaries).

8 *Wilkes v Broadbent* (1742) 1 Wils 63.

9 Eg customary rules of inheritance, differing from those of the common law, were acceptable: Littleton's Tenures ss 210, 211. In the absence of a special custom, however, the general custom was to apply the common law rules: *Brown's Case* (1581) 4 Co Rep 21a at 22a; *Bunting v Lepingwell* (1585) 4 Co Rep 29a at 29b. The common law would also supply any gaps in the customary rules (eg as to collateral descents): *Denn v Spray* (1786) 1 Term Rep 466; *Muggleton v Barnett* (1857) 2 H & N 653, Ex Ch; *Smart v Smart* (1881) 18 ChD 165.

10 Eg *Tukely v Hawkins* (1696) 1 Ld Raym 76.

11 Eg the right to entail a copyhold required proof of a particular custom; but, on proof of such a custom, the law recognised a general custom to bar the entail: *Dell v Rigden* (1594) 4 Co Rep 23a; Co Litt 60b; 1 Rolle Abr 506, line 20; *Taylor v Shaw* (1665) Carter 9 at 10, 22 at 23 per Bridgman CJ; and cf *Everall v Smalley* (1743) 1 Wils 26, 2 Stra 1197; *Carr v Singer* (1750) 2 Ves Sen 603; *Doe d Wightwick v Truby* (1774) 2 Wm Bl 944 (as to the coexistence of different modes of barring the entail by custom). Another example is provided by special customs of inheritance; even when there was a special custom, some general principles of common law (such as the jus representationis) were incorporated by implication: *Clements v Scudamore* (1703) 2 Ld Raym 1024, 1 P Wms 63 at 64 per Holt CJ; *Hook v Hook* (1862) 1 Hem & M 43.

12 *Marquis of Salisbury v Gladstone* (1861) 9 HL Cas 692 at 701, HL, per Lord Cranworth LC (who said he did not see how a copyhold custom could ever be treated as unreasonable); but cf Lord Maugham's comment on this statement in *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 869-870, [1940] 3 All ER 101 at 105, HL. Even in Tudor times, the court would strike down an oppressive and unreasonable custom: *Armstrong's Case* (1597) Co Litt 59b (alleged custom to pay a fine upon a change of lord, held bad because potentially oppressive, though it would be good if payable only on a change occasioned by act of God); *Hobart v Hammond* (1600) 4 Co Rep 27b; *Stallon v Brady* (1603) Co Litt 59b (where there was an alleged custom to assess a fine for admittance at the will of the lord, the court would strike down an unreasonable fine).

13 Eg varying inheritance customs, though recognised in the case of copyhold, might not be acceptable in the case of freehold: *FitzSamuel v Braythe* (1312) Mich 6 Edw II (34 Selden Soc) 199 at 201-202 per Bereford CJ (special custom of inheritance unacceptable in the case of knight service). The fine commonly payable to the lord by a copyhold tenant on the marriage of his daughter could not be claimed in the case of freehold: Littleton's Tenures s 209. See also *Salforde's Case* (1577) Dyer 357b (alleged custom for socage tenant not to lease beyond six years, held unreasonable and void).

14 The commonest were those of ultimogeniture (giving the inheritance to the youngest son or brother, as in borough English) and coparcenary (giving the inheritance to all the sons, as in gavelkind). Other forms were known: eg *Newton v Shafto* (1667) 1 Lev 172, 1 Keb 925, 2 Keb 174, 1 Sid 267 (custom of Tynemouth that lands descended to eldest daughter for life only and then 'skipped' to the next male collateral); *Sympson v Quinley* (1670) 1 Vent 88, 2 Keb 672, 1 Lev 293 (similar custom of Newcastle). It was said to be the custom of Taunton Dean that the fee passed on death to the tenant's wife: 1 Sid 267, 1 Keb 926, 2 Keb 160, 1 Lev 172. See, generally, the articles by FE Farrer in (1924) 68 Sol Jo 808, 839, 864, 880; RJ Faith in 14 Agricultural History Review 77; J Beckerman in 13 Law & Hist Rev 1 at 12-14.

The gavelkind custom of inheritance was abolished in many parts of Kent in 1539: 31 Hen 8 c 3 (repealed). All remaining inheritance customs were abolished with effect from 1 Jan 1926: Law of Property Act 1922 s 128, Sch 12 (repealed).

15 These took various forms: eg *Rowles v Mason* (1612) 2 Brownl 85, 192 (custom for copyholder for life to name successor; as to which see also the custom of Beaminster mentioned in 1 Sid 267 per Wyndham J); *Duke of Grafton v Horton* (1726) 2 Bro Parl Cas 284, HL (custom for tenants to be admitted for three lives, the survivor to nominate another two to hold with himself, and so on in perpetuity); *Lord Abergavenny v Thomas* (1739) West *temp* Hard 649 (similar custom treated as analogous to a power of appointment in remainder); *Devenish v Baines* (1689) Prec Ch 3 (custom for copyholder for life to nominate successor); *Wharton v King* (1796) Anstr 659 (custom of renewing life estates in favour of the heir on payment of a certain fine). (Cf *Lord Grey v Perkins* (1606) Moore KB 788, where the validity of an alleged custom of perpetual renewal in favour of the heir was doubted by Popham and Coke CJJ.) It seems that all such estates were converted into fee simple by the Law of Property Act 1922 s 135 (repealed), which does not distinguish between posthumous renewal in favour of the heir and renewal inter vivos.

16 114 Selden Soc 34 (custom of manor of Appledram in 1430); *Curtise v Cottel* (1586) 2 Leon 72; *Podger's Case* (1612) 9 Co Rep 104a; *Zinan v Talmage* (1680) T Raym 402; *Smartle v Penhallow* (1703) 2 Ld Raym 994, 6 Mod Rep 63, 1 Salk 188 (estate limited to two or three life tenants to have and to hold successively in the order in which they were named); *Phillips v Ball* (1859) 6 CBNS 811. Presumably the Law of Property Act 1922 s 133 (repealed) converted such an estate into a life estate in the life in possession, with remainders.

17 *Foiston v Crachroode* (1587) 4 Co Rep 31b; *Glascock's Case* (1608) 4 Leon 238 (custom for copyholder to fell trees to repair tenements); *Hopkins v Robinson* (1671) 1 Mod Rep 74, 1 Vent 123, 163, 2 Lev 2, 2 Saund 324 (custom for copyholders to have sole pasture in manorial waste, excluding the lord); *Dean and Chapter of Ely v Warren* (1741) 2 Atk 189 (custom to take turves in the Cambridgeshire fens); *Hardy v Hollyday* (1765) cited in *Grimstead v Marlowe* (1792) 4 Term Rep 717 at 718-719 (where it was said that where a profit is to be claimed out of another man's soil, it must be alleged by way of prescription and not by custom, unless in the case of a copyhold tenant against his lord); *Duberley v Page* (1788) 2 Term Rep 391 (custom to dig sand and gravel in the waste); *Coote v Ford* (1900) 83 LT 482 (copyhold custom to kill rabbits on the manorial waste held not unreasonable, but on the evidence not established); and see the Law of Property Act 1922 s 128, Sch 12 (repealed) (preserving commonable and mineral rights); *Re Yateley Common* [1977] 1 All ER 505 at 509, [1977] 1 WLR 840 at 845 per Foster J (customary rights of common). The reason why copyholders were allowed to claim by custom is that they could not prescribe: *Foiston v Crachroode* supra; *Pearce v Bacon* (1595) Cro Eliz 390; *Rowles v Mason* (1612) 2 Brownl 192 at 198 per Coke CJ; *Bean v Bloom* (1774) 2 Wm Bla 926 at 928 per De Grey CJ; *Derry v Sanders* [1919] 1 KB 223 at 237, CA, per Scrutton LJ. But see *Austin v Amhurst* (1877) 7 ChD 689 at 691 per Fry J (where the point was not considered; cf *Fox v Amhurst* (1875) LR 20 Eq 403); *Payne v Ecclesiastical Comrs and Landon* (1913) 30 TLR 167 (claim of copyhold tenants to fish held unreasonable because the right was not measured by the needs of the houses in which they lived).

18 See PARA 631 note 2 ante.

19 *Powell v Peacock* (1603) cited in *Rowles v Mason* (1611) 2 Brownl 192 at 199 per Coke CJ; *Rockey v Huggens* (1628) Cro Car 220; *Mardiner v Elliot* (1788) 2 Term Rep 746. As to the statutory restrictions on the creation of a strict settlement on or after 1 January 1997 see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

20 See note 5 supra. Conveyance by surrender and admittance was abolished by the Law of Property Act 1922 s 128(3) (repealed): see PARA 643 post.

21 *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 871, 877, [1940] 3 All ER 101 at 106, 110, HL.

22 For entails of copyhold see Littleton's Tenures s 73; Co Litt 60a; *Anon* (1523) Bro Abr, Tenant per copie, pl 24; Bro NC 175; *Erish v Reeves* (1599) Cro Eliz 717; *Pilkington v Stanhop* (1666) 1 Sid 314; *Wentworth v Peables* cited in *Glover v Cope* (1691) 3 Lev 326 at 327 per Hale CJ; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860 at 877, [1940] 3 All ER 101 at 110, HL, per Lord Maugham. (Their validity was for a time denied: *Heydon's Case* (1584) 3 Co Rep 7a at 8a-9a per Manwood CB; *Podger's Case* (1612) 9 Co Rep 105a; *Rowdon v Malster* (1626) Cro Car 42 at 45. But an example of entailed villeinage has been found as early as 1292: 114 Selden Soc cliv, 45.) A copyhold entail was held to be governed by 13 Edw 1 (Statute of Westminster the Second) (1285) c 1 (commonly called the statute De Donis Conditionalibus), though the statute was made within legal memory, because the statute 'co-operated' with the custom: Co Litt 60a; *Gravener v Rake* (1593) Cro Eliz 307; *Warne v Sawyer* (1614) 1 Rolle Rep 48; *Everall v Smalley* (1743) 1 Wils 26 at 27 per Wright J; *Roe d Crow v Baldwere* (1793) 5 Term Rep 104 at 111 per Lord Kenyon CJ.

23 See PARA 703 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq. The evidence is normally of the custom being observed in particular instances, but a presentment of manorial customs by the homage is admissible evidence even if there is no proof of their having being used: *Roe d Beebee v Parker* (1792) 5 Term Rep 26; and see *Chapman v Cowlan* (1810) 13 East 10 (document signed by copyholders). (As to evidence of reputation to prove a custom see also PARA 622 text and note 7 ante.) Any person interested in copyhold land enfranchised by the Law of Property Act 1922 has a right to inspect the court rolls of the manor of which the land was held, on payment of the prescribed fee: see s 144; and PARA 702 post. As to copyhold enfranchisement see PARA 643 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

24 *Doe d Mason v Mason* (1770) 3 Wils 63; *Roe d Bennett v Jeffery* (1813) 2 M & S 92.

25 Eg *Denn v Spray* (1786) 1 Term Rep 466; *Duke of Portland v Hill* (1866) LR 2 Eq 765; *Re Yateley Common* [1977] 1 All ER 505, [1977] 1 WLR 840. For use of surveys by the Crown or parliamentary commissioners, setting out a custom, see *Smith v Earl Brownlow* (1870) LR 9 Eq 241 (disapproving a remark of Lord Chelmsford LC in *Phillips v Hudson* (1867) 2 Ch App 243); *Sitwell v Worrall* (1898) 79 LT 86. A purely private survey may be inadmissible: see *Rowe v Brenton* (1828) 8 B & C 737 at 749 per Littledale J; cf *Hutchings v Strode* (1634) Nels 26.

26 *Johnstone v Spencer* (1885) 30 ChD 581 at 590 (where the evidence of a custumal was held not to be conclusive because it was not an exhaustive statement of the customs).

27 *Duke of Portland v Hill* (1866) LR 2 Eq 765. It may be more difficult to deduce customary principles from particular instances in the rolls, but there is no fundamental distinction between formal statements of custom and particular instances with regard to the extrapolation of principles to unprecedented situations: *Muggleton v Barnett* (1857) 2 H & N 653, Ex Ch. See further CIVIL PROCEDURE.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(6) MANORIAL CUSTOMS/643. Effect of statutory enfranchisement.

643. Effect of statutory enfranchisement.

Copyhold tenure was abolished by the Law of Property Act 1922, and all copyhold land[1] enfranchised with effect from 1 January 1926[2]. As from that date every parcel of copyhold land was, by virtue of the Act, enfranchised and ceased to be of copyhold tenure[3]. Modes of assurance authorised by special custom were abolished, and it was enacted that all land (including land held in free tenure but subject to custom) should be dealt with as land held in free and common socage discharged from custom[4]. Apart from this express provision, it seems that the mere enfranchisement would have extinguished all copyhold customs running with the tenure, and changed the tenure into free and common socage[5]. All customary suits and services and the liability to do fealty were abolished[6]. So were the customs of Borough English, gavelkind, and other customary modes of descent[7]. Dower, freebench, tenancy by the curtesy and all other customary estates for a widow or widower were abolished, with a saving for cases where the husband or wife died before 1 January 1926[8]. The lord's customary rights to fines, reliefs, heriots, and other dues, and rights as to timber, were abolished with effect from 1 January 1936[9]. Copyhold estates for life or lives, or for years, where the tenant had no right of perpetual renewal, were converted into leasehold interests; where there was a custom of perpetual renewal, they were converted into freeholds in fee simple[10]. These provisions

extended to all manors, including those belonging to the Crown, the Duchy of Lancaster, and the Duchy of Cornwall[11].

It was expressly enacted that the enfranchisement[12] should not deprive the tenant of any commonable rights[13], but that these, if existing in respect of the copyhold land, should continue to attach to the land[14]; that it should not affect the lord's or the tenant's rights to mines, minerals, or quarries, whether in or under the enfranchised land or not, or rights of working the same[15]; and that it should not affect any liability subsisting on 1 January 1926 (whether arising by virtue of a court leet regulation or otherwise) for the construction, maintenance, cleansing, or repair of dykes, ditches, canals, sea or river walls, piles, bridges, levels, ways and other works for the protection or general benefit of land within a manor, or for abating nuisances therein[16].

A purchaser of enfranchised copyhold is bound by the custom of the manor and takes the land subject to the rights and burdens of the vendor[17].

1 Copyhold land, so enfranchised, included: (1) land commonly known as customary land, or customary freehold land, where the freehold was in the lord and not in the customary tenant; (2) land of copyhold tenure held for life or for lives or for years, whether or not determinable with life, where the tenant had by custom a perpetual right of renewal, subject or not to the fulfilment of any conditions; (3) land held in free tenure for life or lives or for years, whether or not determinable with life (but subject to custom), where the tenant had by a custom a perpetual right of renewal, subject or not to the fulfilment of any conditions: Law of Property Act 1922 s 189 (repealed).

'Customary freehold' is a misleading term, because the freehold was usually in the lord and not the tenant, although the tenant did not hold at the will of the lord; see Scriven on Copyholds (7th Edn) 14-15; *Doe d Cook v Danvers* (1806) 7 East 299; *Thompson v Hardinge* (1845) 1 CB 940; *Delacherois v Delacherois* (1864) 11 HL Cas 62 at 83, HL. It was sometimes referred to as copyhold: eg *Doe d Edmunds v Llewellin* (1835) 2 Cr M & R 503 (held to be 'copyhold' for the purposes of a statute); *Re Rutherford's Conveyance* [1938] 1 All ER 495.

The Law of Property Act 1922 did not mention tenant-right, a form of tenure in the counties of Cumberland, Northumberland, and Westmorland, which was neither copyhold nor freehold; but it falls under the description of customary land in which the freehold is in the lord, and arguably it was 'commonly known' as such: see *Duke of Somerset v France* (1725) Fort 44; *Stephenson v Hill* (1762) 3 Burr 1273; *Doe d Reay v Huntington* (1803) 4 East 271 at 288 per Lord Ellenborough CJ. For the origins of tenant-right see Hoyle, 116 Past and Present 24 (1987).

The effect of the Law of Property Act 1922 on tenure in ancient demesne is unclear, because some tenants in ancient demesne had freehold: *Merttens v Hill* [1901] 1 Ch 842; cf *Iveagh v Martin* [1961] 1 QB 232 at 241 per Megarry QC (point not considered in the judgment of Paull J). Tenants in ancient demesne had several privileges, including exemption from various tolls and taxes and from jury service outside the manor. The tenure is confined to such lands as were held of the Crown at the time of Domesday Book. See Scriven on Copyholds, ch I s 3.

2 Law of Property Act 1922 s 191(2); Law of Property Act (Postponement) Act 1924 s 1 (both repealed). For giving effect to the Law of Property Act 1925, which came into operation on 1 January 1926 (s 209(2) (now repealed)), the enfranchisement of copyhold land, and the conversion into long terms of perpetually renewable leaseholds and of leases for lives and of leases for years terminable with life or lives or on marriage, as effected by the Law of Property Act 1922, is deemed to have been effected immediately before the commencement of the Law of Property Act 1925: see s 202; and REAL PROPERTY vol 39(2) (Reissue) PARA 32. For an instance of the successive operation of the enfranchisement provisions of the Law of Property Act 1922 and the transitional provisions of the Law of Property Act 1925 see *Re King's Theatre, Sunderland, Denman Picture Houses v Thompson and Collins Enterprises* [1929] 1 Ch 483. The legislation has itself been almost entirely repealed as spent or obsolescent: Statute Law (Repeals) Act 1969 s 1, Schedule Pt III. See further REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

3 Law of Property Act 1922 s 128(1) (repealed).

4 Ibid s 128(3) (repealed). It has sometimes been supposed that the effect of this subsection was to abolish all manorial customs attaching to freehold land, but this may be an unduly wide interpretation. Given the conveyancing context of the subsection as a whole, and according due weight to the expressions 'subject to custom' and 'should be dealt with as', it is probable that the only freehold customs meant to be 'discharged' were those governing the tenure and services, the estate, and the mode of conveyance.

5 See 1 Watkins on Copyholds (4th Edn) 450. For customs which run with the land see PARA 648 post.

6 Law of Property Act 1922 s 128(2), Sch 12 para (1)(b) (repealed). 'Customary suits and services' probably refers principally to attendance at the customary or copyhold court, which was the duty of all copyholders. The only other services commonly exacted were fealty, rent of assize, relief and heriot, all of which are expressly abolished by the same Act.

7 In cases where descent of a beneficial interest to the heir of a deceased person is still possible, for example in the case of an entailed interest, descent after 1 January 1926 is to the common law heir and not to the customary heir: *Re Price* [1928] Ch 579 at 594-595; and see *Re Sirett* [1968] 3 All ER 186, [1969] 1 WLR 60.

8 Law of Property Act 1922 Sch 12 para (1)(d) (repealed). The saving for freebench applied also where the right had attached before 1 January 1926 and could not be barred by a testamentary or other disposition made by the husband. The right then, unless released, remained in force in equity (Sch 12 para (1)(d) proviso (repealed)). The abolition of customary modes of descent and of dower, freebench and curtesy is repeated in the Administration of Estates Act 1925 s 45.

For freebench and customary dower and curtesy see Select Cases in Manorial Courts, 114 Selden Soc cxxi.

9 Law of Property Act 1922 s 138 (repealed). This referred to the 'manorial incidents' saved by Pt V, and these were listed in s 128(2) (repealed). It seems probable that only the lord's rights to timber were intended (see Sch 13 Pt 2(12) (repealed)), though this is not made clear. As to timber rights see further PARA 644 note 1 post.

10 Ibid ss 133, 135 (repealed).

11 Ibid s 134 (repealed). As to the ancient demesne of the Crown see note 1 supra.

12 Ibid Sch 12 (repealed) applied only to 'enfranchisement', but this was defined by the Copyhold Act 1894 s 94 (repealed) (which definition was incorporated into the Law of Property Act 1922 by s 189 (repealed)) as including the discharge of freehold lands from heriots and 'other manorial rights'. Manorial rights in the context of extinguishment under the Copyhold Act 1894 seem to have meant quit rents, free rents, and 'other manorial incidents': s 2. The Law of Property Act 1922 used rather different language in the case of ancient freehold; it was 'discharged from custom' (s 128(3) (repealed); see note 4 supra) and from manorial incidents of a like nature to those mentioned in s 128(2) (s 138(1) (both repealed)). It is not certain that these two provisions encompassed all rights attaching by manorial custom to ancient freehold. See further note 4 supra.

13 There was no general custom entitling a copyhold tenant to rights of common, nor could a copyhold tenant prescribe for common, and therefore such rights have to be established by proving a special custom of the manor. See *Gateward's Case* (1607) 6 Co Rep 59b at 60a; *Re Yateley Common* [1977] 1 All ER 505 at 509, [1977] 1 WLR 840 at 845 per Foster J. All rights of common now have to be registered under the provisions of the Commons Registration Act 1965: see COMMONS vol 13 (2009) PARA 508 et seq.

14 Law of Property Act 1922 Sch 12 para (4) (repealed). There is the same saving in the Copyhold Act 1894 s 22 (repealed).

15 Law of Property Act 1922 Sch 12 para (5) (repealed). See further PARA 644 post.

16 Ibid Sch 12 para (6) (repealed). Any person interested in enforcing the liability could apply to the court to ascertain or apportion the liability, and charge the same on the land or any interest therein.

17 *Executors of John Hargreaves Ltd v Burnley Corpn* [1936] 3 All ER 959, CA. See also PARA 648 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(6) MANORIAL CUSTOMS/644. Customary mineral rights.

644. Customary mineral rights.

The general rule as to mines and minerals in or under copyhold land was that, since the freehold property belonged to the lord and the possession to the tenant, neither the lord nor the tenant could work them without the licence of the other[1]. The same rule applied to customary freehold[2]. It follows that, if either the lord of the manor or the tenant claims to extract minerals in or beneath land which was formerly copyhold or customary freehold, without licence, the right must be supported by a special custom[3]. A custom permitting the lord to extract minerals beneath a tenant's land will be held reasonable only if it restrains the lord

from injuring or letting down the surface[4], or at least requires compensation to be paid to the tenant for any damage caused by so doing[5]. In the case of ancient freehold within a manor, the general rule is that the minerals belong to the tenant; but this rule may likewise be displaced by custom[6]. Where a particular kind of mineral has never been worked before, it is said that there cannot be a custom for either the lord or the tenant to work it[7].

The effect of enfranchisement at common law was to vest the mines and minerals in the tenant. However, the statutory enfranchisement of copyhold by the Law of Property Act 1922 did not affect the lord's or the tenant's rights to mines, minerals, limestone, lime, clay, stone, gravel, pits or quarries, whether in or under the enfranchised land or not, or any right of entry, right of way and search, or other easement or privilege of the lord or tenant in, on, through, over or under any land, or any powers which in respect of property in the soil might but for the enfranchisement have been exercised for the purpose of enabling the lord or tenant, their or his agents, workmen, or assigns, more effectively to search for, win and work any mines, minerals, pits or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel or other substances had or gotten therefrom[8]. Where the lord has a right to work the minerals under manorial lands, he may construct a tramway through the subsoil of the manorial lands for the purpose of working the mines which are within the manor, but not for other purposes, or for carrying minerals got under lands outside the manor[9]. However, an alleged custom to throw refuse from a mine onto other land near the mine has been held unreasonable and void[10]. Where minerals have been removed from under a former copyhold tenement, the tenant may occupy and enjoy the space so left, for instance by descending the shaft of a mine and using the excavations below for any rational purpose[11].

Interests in coal or coal mines in or under land formerly copyhold which were preserved to the tenant on enfranchisement were excluded from the assets which vested in the former National Coal Board upon the nationalisation of the coal industry, except in a case where the tenant had, by custom or otherwise (other than by virtue of a coal mining lease), the right to work coal without licence of the lord[12]. The position on privatisation of the coal industry is discussed elsewhere in this work[13].

1 Gilbert on Tenures (5th Edn) 328; Scriven on Copyholds ch VIII s 2; *Hoskins v Robins* (1671) 1 Vent 123, 2 Lev 2; *Player v Roberts* (1632) W Jo 243; *Bishop of Winchester v Knight* (1717) 1 P Wms 406 at 408; *Townly v Gibson* (1788) 2 Term Rep 701 at 707 per Buller J; *Bourne v Taylor* (1808) 10 East 189; *Grey v Duke of Northumberland* (1809) 17 Ves 281 at 282 per Lord Eldon LC; *Rowe v Brenton* (1828) 8 B & C 737 at 766 per Lord Tenterden CJ; *Lewis v Branthwaite* (1831) 2 B & Ad 437, approved in *Keyse v Powell* (1853) 2 E & B 132 at 145 per Lord Campbell CJ; *Bowser v Maclean* (1860) 2 De GF & J 415 at 420 per Lord Campbell LC; *Aspden v Seddon* (1876) 1 ExD 496 at 510, CA, per Mellish LJ; *Eardley v Lord Granville* (1876) 3 ChD 826; *IRC v Joicey (No 2)* [1913] 2 KB 580, CA; *Re Clavering, Public Trustee v Clavering* [1915] WN 195; and see *Batten Pooll v Kennedy* [1907] 1 Ch 256 at 264 per Warrington J.

Quarries and stone mines were in the same position: *Peachy v Duke of Somerset* (1721) 1 Stra 447 at 454; *Dearden v Evans* (1839) 5 M & W 11; *Hoyle v Coupe* (1842) 9 M & W 450; and see *Heath v Deane* [1905] 2 Ch 86 (custom established for freeholders and copyholders to get stone from a quarry in the manorial waste).

The law was the same as to timber: *Edwards v Heather* (1724) Cas *temp* King 3; *Whitechurch v Holworthy* (1815) 4 M & S 340, 19 Ves 213; *Lewis v Branthwaite* (1831) 2 B & Ad 437 at 443 per Lord Tenterden CJ; Scriven on Copyholds ch VIII s 1. But customary timber rights in respect of former copyhold land were extinguished with effect from 1 January 1926: see PARA 643 note 9 ante.

2 *Duke of Portland v Hill* (1866) LR 2 Eq 765.

3 For instances of customs authorising copyhold tenants to get minerals out of their own holdings see *Hanmer v Chance* (1865) 4 De GJ & Sm 626 (sand, gravel and clay); *Marquis of Salisbury v Gladstone* (1861) 9 HL Cas 692, HL (clay); *Sitwell v Worrall* (1898) 79 LT 86 (coal); and *Curtis v Daniel* (1808) 10 East 273 (usage establishing lord's right to tin also established tenant's right to copper). Such customs were expressly saved by Law of Property Act 1922, Sch 12 para (5) (repealed).

There is no need for the right to be stinted by reference to the domestic needs of the copyhold tenement. In *Marquis of Salisbury v Gladstone* supra, the House of Lords upheld a custom to take clay for the purpose of making bricks to be sold off the manor.

4 *IRC v Joicey (No 2)* [1903] 2 KB 580.

5 *Hilton v Earl Granville* (1844) 5 QB 701; *Aspden v Seddon* (1876) 1 ExD 496, CA; *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corpn* [1940] AC 860, [1940] 3 All ER 101, HL. See also *Hext v Gill* (1872) 7 Ch 699 (as to mining in the former manorial waste); *Executors of John Hargreaves Ltd v Burnley Corpn* [1936] 3 All ER 959, CA. There is no corresponding restriction placed upon the tenant who has a right to take minerals beneath his own tenement: *Hanmer v Chance* (1865) 4 De GJ & Sm 626.

6 *Curtis v Daniel* (1808) 10 East 273; *Barnes v Mawson* (1813) 1 M & S 77.

7 *Bishop of Winchester v Knight* (1717) 1 P Wms 406; and see *Curtis v Daniel* (1808) 10 East 273 at 276. However, these cases seem to be concerned with evidence rather than any rule of law. It may be possible to maintain a custom to extract all minerals, where the evidence shows that some available minerals were not in fact extracted in former times because they were then considered of little value or did not justify the expense of extraction. (Cf a custom to play all lawful games, even though some sports were for various reasons not played in former times: see PARA 634 ante.)

8 Law of Property Act 1922 Sch 12 para (5) (repealed). 'Mines and minerals' include any strata or seam of minerals or substances in or under any land and powers of working and getting the same but not an undivided share thereof: s 188(1); and see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 12. Without prejudice to the rights to any mines or minerals or the right to work or carry away the same, the owner of the enfranchised land has full power to disturb or remove the soil so far as is necessary or convenient for the purpose of making roads or drains or erecting buildings or obtaining water on the land: Sch 12 para (5) proviso (repealed). For the power of the tenant to grant rights of way or other easements for the winning of mines and minerals by way of compensation for the extinguishment of manorial incidents see s 138(12) (repealed).

There were similar savings for the rights of the lord when enfranchisement was effected under the Copyhold Act 1852 (see s 48 (repealed)) or the Copyhold Act 1894 (see s 23 (repealed)).

9 *Bowser v Maclean* (1860) 2 De GF & J 415; *Eardley v Lord Granville* (1876) 3 ChD 826 at 833 per Jessel MR.

10 *Wilkes v Broadbent* (1745) 1 Wils 63, 2 Stra 1224.

11 *Eardley v Lord Granville* (1876) 3 ChD 826.

12 See the Coal Act 1938 ss 3(1), 5(6) (repealed); the Coal Industry Nationalisation Act 1946 s 5, Sch 1, Pt I para 1(1) (repealed); and *Re Sherwood Colliery* [1939] 1 All ER 88.

13 See MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 3.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(7) ECCLESIASTICAL CUSTOMS/645. Ecclesiastical customs.

(7) ECCLESIASTICAL CUSTOMS

645. Ecclesiastical customs.

The canon law recognised local customs, provided that they were immemorial, reasonable, and not contrary to divine law or to overriding legislation[1]. Although the medieval canonists required at most 40 years' usage for a custom to be established as immemorial, and some provincial customs may be traced to archiepiscopal constitutions made since 1189, the general tests of validity are so similar that there has been no difficulty in absorbing local ecclesiastical customs into the common law. However, a prohibition will lie to an ecclesiastical court if a custom is in issue because the common law will not suffer custom or prescription to be tried by the more relaxed canon law rules as to proof of antiquity[2]. In so far, at least, as customs affect temporal property or monetary obligations, they are triable at common law and governed by exactly the same principles of common law as other local customs[3]. Such customs prevail over general provisions in the canons[4]. It seems nevertheless that a purely spiritual custom, such as a customary duty to say divine service, is triable according to the canon law[5].

Some of the most important ecclesiastical customs formerly obtaining, such as those concerning variations in tithe liability, and the modes of distribution of personal property on death, have been abolished[6]. The principal remaining ecclesiastical customs are those which regulate fees and dues payable to the clergy or to church officials[7], those which govern the number and manner of appointment of churchwardens[8] and other parochial officials[9], and those which define or apportion responsibility for the repair of churches and chapels[10].

As in secular law, the word 'custom' is sometimes loosely used to denote a usage which is not confined to a particular locality; but for such a custom to have binding force it must be part of the ecclesiastical common law[11].

1 Lyndwood, Provinciale (1679 Edn) 22, 25, 143, 172, 199, 253. Some rules of English canon law were themselves customs (of England), being contrary to the universal canon law: eg the custom that chancel repairs belong to the rector (see note 10 infra), and the custom whereby the Sarum use was observed throughout England, contrary to the normal rule that the liturgy of the metropolitan church should prevail (Lyndwood, Provinciale, 104).

2 *Goslin v Harden* (1616) 2 Rolle Rep 419 per Dodderidge J; *Anon* (1626) Latch 48; *Cooker v Goale* (1639) 2 Rolle Abr 307(U) 18; *Brown v Palfry* (1674) 2 Lev 102; *Andrews v Symson* (1675) 3 Keb 523, 527; *Wise v Creeke* (1677) 2 Lev 186 at 187 ('when a custom comes in dispute the custom is temporal and is to be tried in the temporal courts, because their law and the common law differ in the essence of a custom'); *Churchwardens of Market Bosworth v Rector of Market Bosworth* (1699) 1 Ld Raym 435 per Holt CJ ('the reason for which the spiritual court ought not to try customs is because they have different notions of customs, as to the time which creates them, from those that the common law hath'); and see 2 Co Inst 653. As to prohibition see ECCLESIASTICAL LAW.

These opinions assume that the post-Reformation ecclesiastical courts will apply the canonical rules, though this was doubted by Dr Lee DA in *Patten v Castleman* (1753) 1 Lee 387 at 394, Ct of Arches. In *Full v Hutchins* (1776) 2 Cowp 422, a custom was alleged in an archdeaconry court as having been used from time immemorial or for at least 40 years, and a prohibition was refused because the parties had consented to the trial in that court.

3 Doctor and Student, 91 Selden Soc 318; *Scott v Wall* (1618) Hob 247; *Stevenage Churchwardens v Greene* (1618) 2 Rolle Abr 308 (U) 20; *Code v Hulmed* (1623) 2 Rolle Rep 304 (alleged custom for parishioners to elect vicar); *Evelin's Case* (1639) Cro Car 551; *Welby v Herbert* (1676) 2 Lev 163; *Wise v Creeke* (1677) 3 Keb 727, 791, 809, 2 Lev 186; *Read v Deatary* (1734) 7 Mod Rep 199, Ridg *temp* H 42, 2 Barn KB 392 (alleged custom of Easter offering); *Arnold v Bishop of Bath and Wells* (1829) 5 Bing 316; *Bishop of Ely v Gibbons and Goody* (1833) 4 Hag Ecc 156; *Steward v Bateman* (1842) 3 Curt 201 at 203 per Fust DA. If the custom was not traversed, the ecclesiastical court could proceed provided a prohibition was not sought: *Dean and Chapter of Exeter's Case* (1707) 1 Salk 334; *Patten v Castleman* (1753) 1 Lee 387 at 394 per Lee DA; *Spry v St Marylebone Guardians* (1839) 2 Curt 5 at 11 per Dr Lushington.

4 Eg customs as to the election of churchwardens contrary to Canon 89 of 1603: *Case of St Stephen's, Walbrook* (1607) cited in Cro Jac 552; *Shirley v Brown* (1609) 2 Rolle Abr 287 (F) 51; *Warner's Case* (1619) Cro Jac 532; *Jermyn's Case* (1623) Cro Jac 670; *Draper v Stone* (1628) 2 Rolle Abr 287 (F) 51; *Evelin's Case* (1639) Cro Car 551; *Anon* (1675) 1 Vent 267; *Catton v Barwick* (1719) 1 Stra 145, Ct of Delegates; *R v Hinckley Inhabitants* (1810) 12 East 361 at 365; and see note 8 infra. See also *Case of the Parishioners of St Thomas* (1639) 2 Rolle Rep 481, where it is said that a canon of 1603 cannot alter a custom. As to whether a custom can prevail against an ancient constitution in Lyndwood's Provinciale see *Shephard v Payne* (1862) 12 CBNS 414 at 435. See also the Synodical Government Measure 1969 s 1(3).

5 *Williams's Case* (1592) 5 Co Rep 72b; *Jones v Stone* (1700) 1 Ld Raym 578, 2 Salk 550. Cf the Churchwardens (Appointment and Resignation) Measure 1964 s 13, which recognises the validity of customs existing for 40 years before the commencement of the Measure; but this introduces a wholly new rule, for the purpose of the Measure, since the period thus required for proof of a custom under the Measure is constantly increasing.

6 Tithes were abolished by the Tithe Redemption Acts. Customs as to distribution on intestacy were abolished by the Statute of Distributions 1670 (repealed); cf para 616 notes 8, 19 ante for examples of such customs pleaded in secular courts. Customs restricting testation to ensure that aliquot parts were left to the widow and children, if any, were abolished by the Wills Act 1692 (repealed); this affected chiefly the Province of York, since by 1692 there was no general custom in the Province of Canterbury restricting freedom of testation, though cf Rastell, Entries (3rd Edn) 541b (custom of Sussex, allowing the widow one half, confessed by executors).

7 See ECCLESIASTICAL LAW vol 14 para 1194 et seq. Such fees are necessarily modest, in view of the necessity of supposing payment since time immemorial: *Bryant v Foot* (1868) LR 3 QB 497, Ex Ch; and see PARA 625 ante. Mortuaries and corse-presents, which could be claimed in some parishes by custom, were abolished by the Ecclesiastical Jurisdiction Measure 1963 s 82(3). As to customary Easter offerings see *R v Hall* (1866) LR 1 QB 632. Most ecclesiastical fees are now regulated by orders made under Measures of the General Synod, such as the Ecclesiastical Fees Measure 1986.

8 See the Churchwardens (Appointment and Resignation) Measure 1964 ss 12(2), 13; and ECCLESIASTICAL LAW vol 14 para 547. A custom to have no churchwardens, however, is bad: *R v Wix Inhabitants* (1831) 2 B & Ad 197. Churchwardens cannot claim a customary right to set up monuments without the consent of the incumbent or ordinary: *Beckwith v Harding* (1818) 1 B & Ald 508.

9 Eg parish clerks: *Jermyn's Case* (1623) Cro Jac 670; *Case of the Parishioners of St Thomas* (1639) 2 Rolle Rep 481; *Orme v Pemberton* (1640) Cro Car 589.

10 The general rule in England is that repair of the chancel of a parish church is the responsibility of the rector, but by local custom it can be shifted onto the parishioners: Lyndwood, Provinciale (1679 Edn) 250, 253; *Williams v Bond* (1690) 2 Vent 238; *Steward v Bateman* (1842) 3 Curt 201; *Steward v Francis* (1843) 3 Curt 299; *Bishop of Ely v Gibbons and Goody* (1833) 4 Hag Ecc 156; cf *Pense v Prouse* (1695) 1 Ld Raym 59, sub nom *Hawkins v Rous*, Carth 360, 5 Mod Rep 389 (alleged custom for owners of ancient houses to repair or adorn the chancel); *Churton v Frewen* (1866) LR 2 Eq 634 (where the chancel was appendant to a private estate by prescription); and see ECCLESIASTICAL LAW vol 14 paras 1096, 1100, 1107. The custom is said to be prevalent in London, Norwich, and other cities and large towns where the absence of tithes made enforcement against the rector impracticable: Prideaux, Churchwardens' Guide, 27. However, it is not so confined; eg in *Bishop of Ely v Gibbons and Goody* supra such a custom was found to exist in the parish of Clare, Suffolk. If in a particular parish the rector has never been called upon to contribute to chancel repairs, this must be a strong indication that by custom the duty rests on the parishioners. For the means of extinguishing the lay rector's liability see the Ecclesiastical Dilapidations Measure 1923 s 52(2).

See also YB Trin 44 Edw 3, f 18, pl 13 (custom for parishioners to levy a rate for church repairs); *Brown v Palfry* (1674) 2 Lev 102; *Wise v Creeke* (1677) 3 Keb 727, 791, 809, 2 Lev 186 (alleged customs for parishioners served by a chapel of ease to be exempt from repairing the parish church); *Rhodes v Ainsworth* (1817) 1 B & Ald 87 (immemorial custom for inhabitants to repair a chapel).

11 Eg it is said that a pre-Reformation canon can only be of force today if supported by 'general custom and consent within the realm': see *Bishop of Exeter v Marshall* (1868) LR 3 HL 17 at 35, HL, per Blackburn J; *Re St Mary's, Westwell* [1968] 1 All ER 631 at 633-634, [1968] 1 WLR 513 at 516 per Lord Dunboyne Com-Gen Cant.

UPDATE

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NOTE 5--1964 Measure s 13 now the Churchwardens Measure 2001 s 13(1) which recognises the validity of customs which have continued for a period commencing before 1 January 1925.

NOTE 7--1963 Measure s 82 repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(8) EXTINGUISHMENT OF CUSTOM/(i) Abolition by Statute/646. Abolition by statute.

(8) EXTINGUISHMENT OF CUSTOM

(i) Abolition by Statute

646. Abolition by statute.

Custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished by Act of Parliament[1]. It cannot be extinguished by lapse of time[2]. An Act of Parliament may abolish a custom either by express provision[3] or by the use of words

which are inconsistent with the continued existence of the custom[4]. A custom may likewise be abrogated by delegated legislation which is inconsistent with its continued existence[5].

As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, even though the Act does not abolish the custom by express words[6]. As a corollary to this rule, no one can allege a custom against an Act of Parliament[7], unless the custom is saved or preserved by another Act of Parliament[8]. Although the question whether the custom is destroyed or not has been said to turn on the question whether the statute is in the affirmative or the negative, a custom being unaffected by an affirmative statute[9], this distinction appears to be merely one of the factors to be considered in determining whether or not the statute is repugnant to the custom[10]. General provisions in a statute do not necessarily derogate from specific local customs, and if there is any uncertainty as to whether a general statutory provision is inconsistent with a custom, the custom will be taken to survive[11].

1 2 Co Inst 664 (cited at para 610 note 3 ante); *Hammerton v Honey* (1876) 24 WR 603 at 604 per Jessel MR; *Wyld v Silver* [1963] Ch 243, [1962] 3 All ER 309, CA; *New Windsor Corpn v Mellor* [1974] 2 All ER 510 at 518 (affd [1975] Ch 380, [1975] 3 All ER 44, CA).

2 See PARA 624 ante.

3 For instances where customs have been extinguished in general terms by the express provisions of an Act of Parliament see the Municipal Corporations Act 1882 s 247, which established the right of free trading in boroughs 'notwithstanding any custom or byelaw'; the Law of Property Act 1922 s 128(3), Sch 12 para 1(b), (d) (repealed), which abolished customary modes of assurance, customary suits and services, and customary modes of descent (see PARA 643 ante); the Administration of Estates Act 1925 s 45(1), which abolished existing customary and other modes of descent. By the Agricultural Holdings Act 1986 s 77, tenants of an agricultural holding are prevented from claiming any customary compensation for acts done under that statute or for improvements: see AGRICULTURAL LAND vol 1 (2008) PARA 417.

4 Thus in *Salters' Co v Jay* (1842) 3 QB 109, it was held that a custom of London which allowed a person to obstruct his neighbour's lights by building on an ancient foundation was abrogated by the Prescription Act 1832 s 3, which enacts that, when light has been enjoyed for 20 years without interruption, the right thereto is to be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; and see *Truscott v Merchant Taylors' Co* (1856) 11 Exch 855, Ex Ch (a decision to the same effect on the same custom). However, the custom is not wholly abolished by the Prescription Act 1832, but merely for the purposes of s 3: *Perry v Eames* [1891] 1 Ch 658 at 667 per Chitty J; *Bowring Services Ltd v Scottish Widows' Fund and Life Assurance Society* [1995] 1 EGLR 158 at 160-161 per Timothy Lloyd QC. See also *Leicester Corpn v Burgess* (1833) 5 B & Ad 246 (where it was held that statutes permitting the general sale of beer by retail in England did not supersede a custom of a borough prohibiting anyone from carrying on the trade of an alehouse keeper in the borough who was not a burgess); *Lanchbury v Bode* [1898] 2 Ch 120 (where an alleged custom for the owner of the great tithes to keep a bull and a boar for the use of the kine and sows of the parishioners was held to have been impliedly extinguished by the provisions of an Inclosure Act). As to changes of boundary as a result of parliamentary legislation see PARA 616 note 3 ante.

5 *Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808 at 840, [1967] 2 All ER 472 at 490 per Megaw J (supposed custom as to mooring rights, if it existed, abrogated by byelaw, made under statutory authority, requiring permission of the harbour-master for mooring, whether or not this control was in fact exercised); revsd on another point [1968] 2 QB 818, [1968] 1 All ER 979, CA.

6 *Heroun v Bisshopdale* (1384) YB Mich 8 Ric 2 (Ames Fdn) 92, pl 18 (custom for mayor to be guardian in socage, held contrary to the Statute of Marlborough 1267 c 17); *Grisling v Wood* (1588) Cro Eliz 85 (custom to enter proceedings of local court in English, held contrary to 36 Edw 3 c 15); *Green v R* (1876) 1 App Cas 513, HL.

7 Co Litt 115a ('Regularly a man cannot allege a custom against a statute, because that is matter of record, and is the highest proof and matter of record in law'); see *Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808 at 840, [1967] 2 All ER 472 at 490 per Megaw J (alleged custom to fix permanent moorings in Fowley Rythe, a tidal creek in part of Chichester Harbour not proved, and, if proved, would have been destroyed by the bringing into force of the harbour byelaws under statutory authority); revsd on another point [1968] 2 QB 618, [1968] 1 All ER 979, CA.

8 Co Litt 115a; 2 Rolle Abr 266; and see *R v Bagshaw* (1634) Cro Car 347.

9 Co Litt 115a; *Butler v Baker* (1591) 3 Co Rep 25 at 35a; 2 Rolle Abr 266.

10 *London Corpn v R* (1848) 13 QB 30 at 33n (d), Ex Ch, per Alderson B. See also *London Corpn v Bernardiston* (1661) 1 Lev 14 at 15 ('The customs of London are of such force that they shall stand against negative Acts of Parliament'); *R v Bagshaw* (1634) Cro Car 347; *Green v R* (1876) 1 App Cas 513, HL (when a hamlet is abolished by Act of Parliament any custom attaching to the hamlet is also abolished even if there are no express words to this effect in the Act of Parliament).

11 Eg *Bourn v Bruton* (1320) YB Mich 14 Edw 2 (104 Selden Soc) 118, 120 per Herle J (a statute introducing a new remedy will not necessarily be taken as abrogating a local customary remedy, which may well stand with it as an alternative:); *Rector of Edington's Case* (1442) YB Pas 19 Hen 6, f 62 at f 64 b per Fortescue CJ (the availability of formedon under 13 Edw 1 (Statute of Westminster the Second) (1285) c 1 (commonly called the statute De Donis Conditionalibus) did not impliedly abrogate the writ of right used according to the custom of London; '*et la cause est pur ceo que tiel general chose ne excludera ascun especial*'); *Chibborne's Case* (1564) Dyer 229a (questioned whether the custom of London that houses might be sold by parol was abrogated by the Statute of Enrolments, 27 Hen 8 c 16); *Appleton v Stoughton* (1638) Cro Car 516 (where the court inclined to the opinion that the custom of London was good as against 5 Eliz 1 c 4 s 31 (repealed), which forbade persons to exercise any art etc without having been apprenticed to it, because it was 'general'); *R v Earl Shilton Inhabitants* (1818) 1 B & Ald 275 (a statute mentioning 'churchwardens' does not abrogate a custom to appoint only one churchwarden).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(8) EXTINGUISHMENT OF CUSTOM/(ii) Confirmation by Statute or Charter/647. Effect of confirmation.

(ii) Confirmation by Statute or Charter

647. Effect of confirmation.

Where an Act of Parliament has, according to its true construction, incorporated or restated[1] a right which has previously existed by custom, that right becomes henceforward a statutory right[2], and the lower title by custom is merged in and extinguished by the higher title derived from the Act of Parliament[3], unless the Act of Parliament merely intended to confirm the right as a custom. Where the custom has been so extinguished, the old rights do not re-emerge on the repeal of the Act or, it seems, at the termination of a temporary Act[4]. However, a custom would not be affected by the repeal of the Act if the Act merely confirmed and recognised the custom[5]. A general confirmation, which does not set out the rights in detail, is unlikely to be construed as extinguishing the custom; but even a particular confirmation does not necessarily work an extinguishment[6].

All immemorial customs of cities, boroughs, towns and ports have been confirmed by Magna Carta[7], and some other customs have received similar general confirmation by Act of Parliament. It is not obvious what legal effect such a confirmation has[8], since customs which have not been so confirmed also have the force of law and can only be repealed by Act of Parliament[9], and in either case proof is required according the same criteria[10]; yet it would be inappropriate to construe a statutory confirmation as extinguishing a custom, merely in order to give it some legal effect, because an intention to confirm cannot readily be equated with an intention to extinguish[11].

An Act of Parliament which recognises the existence and validity of a particular custom does not necessarily operate to create new statutory rights in favour of the persons or classes of persons who might formerly have benefited by the custom. Such a statute may merely have the effect of sanctioning the validity of the custom as a custom, without merging the custom in the higher title by statute[12]. In determining how far an Act of Parliament has affected rights of this kind, the whole Act must be considered to see whether the rights given by the Act are intended to supersede the rights which previously existed[13].

A confirmation of a custom by royal charter alone is void, because the Crown cannot grant anything contrary to the common law; and yet it has been said that the acceptance of a void charter of this kind by matter of record may have the effect of extinguishing the custom[14].

1 In *New Windsor Corpn v Taylor* [1899] AC 41 at 49, HL, Lord Davey said 'embraced and confirmed', borrowing the language of Littledale J in 1835 (see 3 Cl & F 518), but this is misleading. Littledale J was referring to a charter granted with the assent of parliament, so that it had statutory force from its inception. Lord Davey's remark does not apply to confirmation in the usual sense.

2 *Wake v Hall* (1883) 8 App Cas 195, HL (as to the mining customs of High Peak in Derbyshire, which were set down and revised by private Act of Parliament).

3 *New Windsor Corpn v Taylor* [1899] AC 41 at 49, HL, per Lord Davey (a case on prescription).

4 *New Windsor Corpn v Taylor* [1899] A C 41, HL.

5 See *New Windsor Corpn v Taylor* [1899] A C 41, HL.

6 *Wyld v Silver* [1963] Ch 243, [1962] 3 All ER 309, CA (custom not extinguished by Inclosure Act in which it was explicitly confirmed).

7 Confirmation of Magna Carta 1297 c 9 (which is still in force).

8 *Truscott v Merchant Taylors' Co* (1856) 11 Exch 855 at 866 per Crompton J ('It is said that the customs of London are parliamentary rights; but they are, nevertheless, customs. The only effect of sanctioning them by statute is, that they are to be treated as good customs. The legislature did not mean to give parliamentary rights to the City of London, but only that the customs should be good qua customs, as sanctioned to that extent by the legislature').

9 See PARA 646 ante.

10 This is because a confirmation of 'all customs' in general terms cannot validate de facto customs which are unreasonable or otherwise unlawful, since they cannot properly be called customs. See YB Mich 21 Edw 4, f 67, pl 50 per Bryan CJ; *R v London Corpn* (1829) 9 B & C 1 at 30 per Lord Tenterden CJ.

11 The confirmation in Magna Carta was probably (contrary to modern doctrine) intended to give protection against subsequent legislation (see 42 Edw 3 c 1), and this may be why the customs of London were once thought capable of withstanding Acts of Parliament: *City of London Case* (1610) 8 Co Rep 121b at 129a (the custom of London to devise in mortmain is good, though contrary to the Statute of Mortmain 1279); *R v Bagshaw* (1634) Cro Car 347; *Appleton v Stoughton* (1638) Cro Car 516; *London Corpn v Bernardiston* (1661) 1 Lev 14 at 15 ('The customs of London are of such force that they shall stand against negative Acts of Parliament').

12 See *Truscott v Merchant Taylors' Co* (1856) 11 Exch 855 at 866 per Crompton J. In that case it was held that the custom of London as to light had been abrogated by the Prescription Act 1832; but see PARA 646 note 4 ante.

13 *Manchester Corpn v Lyons* (1882) 22 ChD 287 at 307, CA, per Cotton LJ (dealing with an ancient franchise to hold a market which had formerly rested on prescription and not on custom).

14 *Windsor's Case* (1407) YB Hil 8 Hen 4, f 19, pl 3 per Gascoigne CJ.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(8) EXTINGUISHMENT OF CUSTOM/(iii) By Merger/648. Extinguishment by merger.

(iii) By Merger

648. Extinguishment by merger.

Customs which run with the tenancy or lordship of a manor are extinguished by union[1] of the lordship with the tenancy, either by a surrender, escheat or conveyance from the tenant to the

lord[2], or by a conveyance of the lord's interest to the tenant[3]; but this rule does not apply to customs which run with the land itself, such as the former inheritance customs of gavelkind and Borough English[4]. On the other hand, manorial customs inuring for the benefit of the tenant are not extinguished merely by severance of the freehold from the manor by alienation, for otherwise the lord might unilaterally destroy the rights of the tenant[5].

In the case of copyhold tenure, before 1926, a union of the tenancy with the lordship extinguished the copyhold interest of the tenant but not the custom of the manor, because the lord could make a new demise by copy subject to the custom[6]. However, if while the land was in the lord's hand the lord made a grant at common law, the custom was extinguished for ever[7]. Likewise when the freehold was severed from the manor, it ceased to be demisable by copy, and therefore a union of the copyhold interest with the freehold after severance from the manor extinguished the copyhold for ever. This must also be the consequence of any merger of an enfranchised copyhold after 1925 with the estate of the freeholder of whom the land is held[8].

1 Although the union of the lordship with the tenancy is called merger in some of the cases, it is not properly so called in the case of copyhold because freehold and copyhold could not merge: *Lane's Case* (1586) 1 And 191; Scriven on Copyholds (6th Edn) 280.

2 *Bleverhasset v Homberstone* (1623) W Jo 41, Hutt 65.

3 *Compton v Brent* (1537) Dyer 30b (questioned); *French's Case* (1576) 4 Co Rep 31a; *Bradshaw v Eyre* (1597) Cro Eliz 570; *Fort v Ward* (1598) Moore KB 667; *Marsam v Hunter* (1610) Cro Jac 253, 2 Brownl 209, sub nom *Darson v Hunter* Noy 136; *Parker v Turner* (1687) 1 Vern 458; *Speaker v Styant* (1689) Comb 127; *Styant v Staker* (1691) 2 Vern 250; *Crouther v Oldfield* (1706) 1 Salk 170; *Dunn v Green* (1724) 3 P Wms 9; *Doe d Lowes v Davidson* (1813) 2 M & S 175 (where an allotment to a copyholder under an enclosure award had the same effect); *Barwick v Matthews* (1814) 5 Taunt 365; *Re Holliday* [1922] 2 Ch 698; *Re Yateley Common* [1977] 1 All ER 505 at 513, [1977] 1 WLR 840 at 849 per Foster J. Even a lease for years had this effect: *French's Case* supra; *Ex p Lord Henley* (1861) 29 Beav 311. In the case of copyhold tenancies, this was called enfranchisement. Cf, as to customary freeholds, *Baring v Abingdon* [1892] 2 Ch 374, CA.

4 *Mayne v Cros* (1412) YB 14 Hen 4, f 2, pl 6, at f 5; *Murrel v Smith* (1591) 4 Co Rep 24b; *Jackson v Neal* (1595) Cro Eliz 395; *Payne v Barker* (1682) O Bridg 19 at 28 per Bridgman CJ; and see *Melwich v Luter* (1588) 4 Co Rep 26a. For this reason, there could be freehold Borough English: *Payne v Barker* supra at 28.

A right of copyhold tenants to common outside the confines of the manor ran with the land rather than the tenancy and therefore, unlike common within the manor, was not extinguished by union of the lordship with the tenancy. It was not, however, strictly a customary right, but had to be prescribed for through the lord (ie by asserting that the lord had used from time immemorial to have common for his tenants): *Roberts v Young* (1619) 1 And 192; *Anon* (1634) W Jo 349, pl 1; *Crouther v Oldfield* (1706) 1 Salk 170, 364; *Barwick v Matthews* (1814) 5 Taunt 365.

5 *Lane's Case* (1586) 2 Co Rep 16b at 17a, also sub nom *Smith v Lane* 1 And 191, 1 Leon 170; *Beale v Langley* (1587) 2 Leo 208, 4 Leon 230; *Melwich v Luter* (1588) Cro Eliz 102; *Murrel v Smith* (1591) 4 Co Rep 24b, Cro Eliz 252; *Waldoe v Bertlet* (1620) Cro Jac 573, Hob 181, 2 Rolle Rep 179; *Phillips v Ball* (1859) 6 CBNS 811 at 836 per Cockburn CJ; *Executors of John Hargreaves Ltd v Burnley Corpn* [1936] 3 All ER 959, CA; *Re Yateley Common* [1977] 1 All ER 505 at 515, [1977] 1 WLR 840 at 851 per Foster J.

A conveyance in fee simple of freehold land in a manor (other than a Crown manor) after 1290 severs it from the manor as a result of the statute 18 Edw 1 (Quia Emptores) (1289-1290) c 1: see *Re Holliday* [1922] 2 Ch 698. In such a case copyholders, or the owners of enfranchised copyhold after 1925, remain tenants of the grantee of the severed portion of the manor.

6 *Taverner v Lord Cromwell* (1594) 3 Leon 107 (after forfeiture); *Kempe v Carter* (1587) 1 Leon 55 at 56 (after escheat); *Blemmer Hasset v Humberstone* (1623) Hutt 65, W Jo 41 (after sale to lord); *Douncliffe v Minors* (1639) 1 Rolle Abr 639 (B) 2 (after escheat or surrender); *Page v Smith* (1696) 3 Salk 100, Comb 397 (after forfeiture); *Doe d Gibbons v Pott* (1781) 2 Doug KB 710 at 720 per Lord Mansfield CJ (after surrender); *Badger v Ford* (1819) 3 B & Ald 153 (after forfeiture).

7 *French's Case* (1576) 4 Co Rep 31a; *Douncliffe v Minors* (1639) 1 Rolle Abr 639 (B) 1; *Lee v Boothby* (1640) Cro Car 521, W Jo 449; *Hutchings v Strode* (1634) Nels 26. This would be the consequence even of a lease for a year: *Trevilian v Parkins* (1555) CP 40/1150, m 804; Dyer 114a; *Douncliffe v Minors* supra at 639 (B) 3.

8 In the case of an enfranchisement before 1926 by act of the parties, the conveyance of the freehold to a copyholder severed the tenancy from the manor by the operation of the statute Quia Emptores 1290 (see note 5 supra): *Chetwode v Crew* (1746) Willes 614; *Bradshaw v Lawson* (1791) 4 Term Rep 443; *Re Holliday* [1922] 2 Ch 698 at 717. The statutory enfranchisement of copyholds under the Law of Property Act 1922 did not have this effect, because it did not operate as a conveyance from the lord to the tenant but as an alteration of the tenure. As to that statutory enfranchisement see further REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/1. CUSTOM/(8) EXTINGUISHMENT OF CUSTOM/(iv) By Non-user or Non-claim/649. Extinguishment by non-user.

(iv) By Non-user or Non-claim

649. Extinguishment by non-user.

A customary right cannot be extinguished by mere non-user or non-claim, without an abandonment, in the sense of a clear intention that neither the person entitled to the right nor his successors in title should ever use it again[1].

1 *Re Yateley Common* [1977] 1 All ER 505, [1977] 1 WLR 840; and see PARA 624 note 1 ante. For the effect of non-user on immemorial franchises, cf Hesketh's Reading on the Forest Law, 113 Selden Soc 49; Spelman's Reading on Quo Warranto, 113 Selden Soc 99; *Wyld v Silver* [1963] Ch 243 at 254-255, [1962] 3 All ER 309 at 313, CA, per Lord Denning MR (treated as 'custom').

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(1) SCOPE, EFFECT AND EXTINGUISHMENT OF USAGES/650. Usage defined.

2. USAGE

(1) SCOPE, EFFECT AND EXTINGUISHMENT OF USAGES

650. Usage defined.

Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life or entering into a common type of contract[1], or more fully as a particular course of dealing or line of conduct which has acquired such notoriety that, where persons enter into contractual relationships of the particular kind, or in the particular place, to which the usage is alleged to attach, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary[2]. In other words, a rule of conduct, or an understanding as to the content or meaning of a contract, amounts to a usage if it is so generally known in the particular context in which a contract is made that it is unnecessary to mention it and, unless expressly or impliedly excluded, it must be considered as forming part of the contract without being expressly mentioned[3].

The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods defines usage for its purposes as 'any practice or method of dealing which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract'[4].

Usage in the sense indicated above must be distinguished from user or enjoyment in relation to incorporeal rights[5], and from the course of conduct of the persons interested under a particular

ancient charter or other ancient document. In this last sense it is limited to the conduct of persons actually affected by the document in question, and may be referred to only for the purpose of showing the meaning of expressions which by reason of their antiquity have become obscure[6]. Recourse to long usage in this sense is not confined to Crown grants, but may be had in the case of ancient Acts of Parliament[7], private grants[8], and charitable trusts[9]. By way of contrast, the conduct of the parties to a contract, subsequent to the agreement, is inadmissible as evidence of the meaning of its terms[10]. Usage in relation to ancient documents may mean the usage as to the meaning of expressions prevailing at the time when the document was written[11]; contemporaneous usage may assist with the interpretation not only of deeds and charters but also Acts of Parliament[12]. This is closely analogous to usage in the contractual sense, because it does not refer to a course of conduct subsequent to the making of a document but to the context in which the document was made: the language of a distant period is thus treated in the same way as the language of a particular locality or a particular group of people who use words in a special way.

A usage must also be distinguished from a mere trade practice. A practice, however frequently repeated, does not affect legal relations unless it is considered to be a binding rule[13]. Such a usage may, however, be relevant in the law of distress in establishing reputed ownership[14].

1 The effect of usage on contracts is not restricted to parties who are in business: see PARAS 652 note 3, 663 post.

2 For judicial definitions of usages, or passages from which the nature of a usage may be ascertained, see notes to *Wigglesworth v Dallison* (1779) 1 Doug KB 201 in 1 Smith LC (13th Edn) 597; *Hutton v Warren* (1836) 1 M & W 466 at 475 per Parke B; *Lewis v Marshall* (1844) 7 Man & G 729 at 744 per Tindal CJ; *Brown v Bryne* (1854) 3 E & B 703 at 715 per Coleridge J; *Myers v Sarl* (1860) 3 E & E 306 at 315 per Cockburn CJ; *Robinson v Mollett* (1875) LR 7 HL 802 at 817 per Brett J; *Nelson v Dahl* (1879) 12 ChD 568 at 575, CA, per Jessel MR; *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA, per Kay LJ; *Moult v Halliday* [1898] 1 QB 125 at 129 per Channell J (where, however, he used the word 'custom', although obviously not referring to an immemorial custom); *Re North Western Rubber Co Ltd and Huttenbach & Co* [1908] 2 KB 907 at 923, CA, per Buckley LJ; *Lord Forres v Scottish Flax Co Ltd* [1943] 2 All ER 366 at 368, CA, per Scott LJ; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 572, [1967] 1 WLR 1421 at 1438 per Ungoed-Thomas J; and see PARA 656 post.

3 *Moult v Halliday* [1898] 1 QB 125 at 129 per Channell J; and see PARA 657 post.

4 See the Uniform Laws on International Sales Act 1967 s 2(1), Sch 2, art 13(1) (which gives effect to two conventions made at the Hague on 1 July 1964: see ss 1, 2); and the Supply of Goods (Implied Terms) Act 1973 s 5(2). One of the conventions referred to in the 1967 Act is the Convention relating to a Uniform Law on the International Sale of Goods 1972 (Cmnd 5029). The uniform law on the international sale of goods annexed to that convention is set out in the Uniform Laws on International Sales Act 1967 s 1(1), Sch 1. The other is the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1972 (Cmnd 5030). The uniform law on the formation of contracts for the international sale of goods annexed to that convention is set out in the Uniform Laws on International Sales Act 1967 Sch 2. The conventions came into force as respects the United Kingdom on 18 August 1972: see the Uniform Laws on International Sales Order 1972, SI 1972/973 (amended by SI 1987/2061). The uniform laws apply to certain contracts of sale of goods entered into by parties whose plans of business are in different contracting states, but only if the parties have so chosen: Uniform Laws on International Sales Act 1967 s 1(3), Sch 1, art 1, Sch 2, art 1; Uniform Laws on International Sales Order 1972 art 2. See further CONTRACT vol 9(1) (Reissue) PARAS 625, 684; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 382.

5 See EASEMENTS AND PROFITS A PRENDRE.

6 2 Co Inst 282; *R v Varlo* (1775) 1 Cowp 248 (usage admitted to explain charter of Charles I); *R v Osbourne* (1803) 4 East 327 (continuous and contemporaneous usage both admitted to explain relationship between charters of Henry VI and James II); *Stammers v Dixon* (1806) 7 East 200 (grant of land interpreted by usage to mean merely a grant of the fore-crop or prima tonsura); *Chad v Tilsed* (1821) 2 Brod & Bing 403 (modern inclosure and use of a bay covered only at high tide held to raise a presumption of similar user since the date of a grant of Henry VIII, and relied upon as showing the meaning of the grant); *R v Grout* (1830) 1 B & Ad 104 at 111 per Bayley J; *R v Davie* (1837) 6 Ad & El 374 (usage admitted to explain charter of Edward VI); *Duke of Beaufort v Swansea Corpn* (1849) 3 Exch 413 (the question being what was the Seignory of Gower, evidence of habitual use of the foreshore by the grantees was admitted to show that the foreshore was included in the grant); *Healy v Thorne* (1870) IR 4 CL 495 (evidence of 70 years' usage admitted to show whether a grant of an

island by patent of James I included the foreshore); *Hastings Corpn v Ivall* (1874) LR 19 Eq 58; *Earl de la Warr v Miles* (1881) 17 ChD 535 at 573 per Bacon V-C ('It is not to be disputed that when the necessity of the case requires it, evidence of more recent usage and custom may be adduced for the purpose of explaining old, or obsolete, or even imperfect expressions to be found in ancient documents'); *A-G v Vandeleur* [1907] AC 369, HL (evidence of usage admitted to show whether grant of manor by James I included the foreshore); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 234 at 261, [1973] 2 All ER 39 at 53, HL, per Lord Wilberforce; and see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 206, 207.

7 *Sheppard v Gosnold* (1672) Vaugh 159 at 169-170 per Vaughan CJ; *Hebbert v Purchas* (1871) LR 3 PC 605 at 650, PC, per Lord Hatherley LC; *Dublin Corpn v Trinity College* (1903) 88 LT 305, HL. But even long usage would not have any effect if the wording of the statute was clear, since if the usage was contrary to the natural meaning of the words it would simply have been unlawful: *Dublin Corpn v Trinity College* supra; and see *R v Forrest* (1789) 3 Term Rep 38 (usage cannot modify the operation of an Act of Parliament); *Lord Advocate v Walker Trustees* [1912] AC 95 at 102-103 per Lord Atkinson. See also PARA 661 note 5 post.

8 *Sadlier v Biggs* (1853) 4 HL Cas 435; *Lord Waterpark v Fennell* (1859) 7 HL Cas 650.

9 Long usage may either aid in the construction of an ancient trust instrument or establish the terms of a trust where there is no instrument. See *Withnell v Gartham* (1795) 6 Term Rep 388; *A-G v Rochester Corpn* (1854) 5 De GM & G 797; and CHARITIES vol 8 (2010) PARAS 111-112.

10 *Clifton v Walmesley* (1794) 5 Term Rep 564; *Simpson v Margitson* (1847) 11 QB 23; *North Eastern Rly v Lord Hastings* [1900] AC 260, HL; *Bruner v Moore* [1904] 1 Ch 305; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, HL; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL.

11 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 206, 207. Lord Hardwicke LC seems to intend this sense in *A-G v Parker* (1747) 3 Atk 576 at 577 ('in the construction of ancient grants and deeds there is no better way of construing them than by usage, and contemporanea expositio is the best way to go by').

Reference may likewise be made to earlier usage, that is, to the way words were used in charters prior to that in question: *R v Grout* (1830) 1 B & Ad 104 at 111 per Bayley J.

12 *Lucton School (Governors) v Scarlett* (1828) 2 Y & J 330, Ex Ch; *Hebbert v Purchas* (1871) LR 3 PC 605, PC; *Harington v Sendall* [1903] 1 Ch 921. Local usage cannot be admitted to interpret a statute, since a statute must have a single meaning throughout the realm: *R v Hogg* (1787) 1 Term Rep 721 at 728 per Grose J; *R v Major* (1792) 4 Term Rep 750. Nor is trade usage admissible for this purpose, for the like reason, and because it would turn the interpretation of a statute into a question of fact: *A-G v Cast-Plate Glass Co* (1792) 1 Anstr 39 at 44 per Eyre CB. However, a usage existing at the time when the statute was passed may be relevant to its interpretation if it may be presumed to have been in the mind of the legislature: *Reniger v Fogossa* (1552) 1 Plowd 1 at 18a (usage as to the meaning of earlier statutes in similar terms may be taken to have been confirmed by Parliament and is therefore an aid to interpretation); *Leverson v R* (1869) LR 4 QB 394, 406. As to statutory interpretation see generally STATUTES.

13 *Houlder v General Steam Navigation Co Ltd* (1862) 3 F & F 170 at 174 per Cockburn CJ; *Meyer v Dresser* (1864) 16 CBNS 646 at 662-663 per Willes J; *Abbott v Bates* (1875) 45 LJQB 117, CA; *Anderson v Sutherland* (1897) 13 TLR 163 at 165 per Lord Russell of Killowen CJ; *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 at 8 per Bailhache J; *The Rehearo* [1933] P 286 at 294 per Langdon J; *FE Hookway & Co Ltd v Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep 491 at 510 per Devlin J; *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 1 Lloyd's Rep 31 (revsd [1957] 2 Lloyd's Rep 1, CA); *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 573, [1967] 1 WLR 1421 at 1438 per Ungoed-Thomas J; *General Reinsurance Corpn v Forsakringaktienbolaget Fennia Patria* [1983] QB 856 at 875, [1983] 2 Lloyd's Rep 287 at 296 , CA, per Slade LJ; *Pryke v Gibbs Hartley Cooper Ltd* [1991]1 Lloyd's Rep 602 at 615. In *The Leegas* [1987] 1 Lloyd's Rep 471, a suggestion by counsel that a market practice falling short of a usage might be regarded as forming part of the matrix of agreement, for the purpose of interpretation, was rejected by the court.

14 Eg *Chappell & Co Ltd v Harrison* (1910) 103 LT 594; and see DISTRESS vol 13 (2007 Reissue) PARA 954. For an analogous doctrine in the law of bankruptcy, which was abolished by the Insolvency Act 1985, see PARA 657 note 1 post.

UPDATE

650 Usage defined

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(1) SCOPE, EFFECT AND EXTINGUISHMENT OF USAGES/651. Usage distinguished from custom.

651. Usage distinguished from custom.

Although the terms usage and custom are often used interchangably, they are in law distinct[1]. Usage differs from custom properly so called in that, whereas custom takes the place of the common law for certain purposes in the locality where it operates, usage cannot contradict or replace the common law[2] and can only bind parties who have acted voluntarily in a context where the usage prevails. Unlike custom, usage is not inveterate and can emerge from or adapt to changing conditions, or become obsolete[3]. Moreover, it may obtain throughout the realm, or even beyond, whereas custom is law only within a definite locality[4].

Custom is immutable law which individual parties are not free to modify or reject. Usage, on the other hand, is not of itself legally binding. Usage derives such force as it has solely from the express or implied consent of individual parties, and cannot create legal obligations independently of the common law of contract[5]. It is not competent to a body of tradesmen or brokers to invent laws to bind other people without their knowledge[6].

The effect of usage can never be more than the parties could themselves have achieved by express agreement[7], independently of usage, whereas custom represents a rule of law which (by varying from the common law) could never be established by agreement or grant[8]. Thus, if there were a usage whereby agreements without consideration were treated as binding contracts, it would be ineffective to establish a contract binding in law[9], whereas an immemorial local custom to the same effect would be effective. On the same principle, a usage cannot make third parties liable, or entitle them to benefits, under contracts to which they are not privy[10], or impose a duty to take positive action[11]. Likewise, a usage cannot alter the character of interests in land[12]. Thus, a local usage which extended the categories of trees considered as timber in a particular region would be ineffective to render a tenant liable for waste, if the relationship between reversioner and tenant was non-contractual, whereas an immemorial local custom would bind the tenant[13]. On the same principle, a mere usage could not provide a defence to an action for infringement of copyright[14].

It has therefore been said that usage is of importance only in relation to consensual agreements, since it is the assent of the parties which gives it its force[15]. This is not, however, universally correct. Usage is sometimes relevant in the law of tort, for instance in deciding whether a person has been negligent[16]. Where the question is whether a person following a profession or calling has fallen below the standards of care usually observed in that profession or calling, usage is often referred to as 'normal practice', or 'general and approved practice'. Usage or practice, in this sense, does not operate in the same way as a usage incorporated into a contract, since it is merely evidence relating to the issue of fault and does not bind a party to act in a particular way[17]. Usage or normal practice may also be resorted to in interpreting an Act of Parliament, where the statute itself refers to usage or something analogous[18]. It may also serve as evidence of reputed ownership in the law of distress[19].

Usage operates as evidence rather than as law, and it does not have to be pleaded[20]. The effect of usage was therefore within the province of the jury, when juries were used in commercial cases, and for this reason the law governing usage is of more recent origin than that governing local custom[21]; but there is nothing new in the idea that contracts must be interpreted in the light of relevant usage[22].

1 For the distinction see *Sewell v Corp* (1824) 1 C & P 392 at 393 per Best CJ; *Partridge v Bank of England* (1846) 9 QB 396 at 425 per Tindal CJ; *Juggomohun Ghose v Manickchund* (1859) 7 Moo Ind App 263 at 282, PC, per Sir John Coleridge; *Robinson v Mollett* (1875) LR 7 HL 802 at 826, HL, per Cleasby B; *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 616, HL, per Lord Blackburn; *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA, per Kay LJ. For examples of confusion see PARA 601 note 11 ante.

2 See PARA 661 post.

3 *Juggomohun Ghose v Manickchund* (1859) 7 Moo Ind App 263 at 282, PC, per Sir John Coleridge (usage need not be immemorial, but may even be 'in course of growth'); *Robinson v Mollett* (1875) LR 7 HL 802 at 827, HL, per Cleasby B; *Goodwin v Robarts* (1875) LR 10 Ex 337 at 346, Ex Ch; *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] 2 All ER 83 at 86, PC. As to desuetude see PARA 655 post.

4 See PARA 652 post. As to custom, cf paras 601-602, 616 ante.

5 *Clerke v Martin* (1702) 2 Ld Raym 757 at 758 per Holt CJ (holding that promissory notes could not become negotiable by virtue of usage, a decision that was criticised on its facts and overturned by Act of Parliament); Christian's note to 1 Bl Com 75; *Partridge v Bank of England* (1846) 9 QB 396 at 425, Ex Ch, per Tindal CJ ('a practice of trade ... cannot alter the law'); *Barlow v Woolcott* (1870) 8 SCR 360 (NSW); *Hathesing v Laing* (1873) LR 17 Eq 92 at 105 per Bacon V-C ('The custom that these gentlemen talk about cannot override the plain well-established law, which is that to assert a lien you must be entitled to possession'); *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 (which was overruled on its facts by *Goodwin v Robarts* (1875) LR 10 Ex 337, Ex Ch, but without unsettling the general principle); *Robinson v Mollett* (1875) LR 7 HL 802 at 826-827, HL, per Cleasby B (unlike customs, trade usages 'have no legal obligation, except in so far as persons expressly or impliedly consent to them'); *Goodwin v Robarts* supra at 357 (as to which see PARA 664 notes 3, 6 post); *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] 2 All ER 83 at 86, PC. There is an apparent exception in the case of negotiable instruments: see PARA 664 post. See also *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC; and PARA 663 note 8 post.

6 *Anderson v Sutherland* (1897) 13 TLR 163 at 165 per Lord Russell of Killowen CJ ('The Stock Exchange had been trying for a number of years to be an imperium in imperio, to be a law unto themselves, and had sought again and again to impose those laws upon a class he should call outsiders. Although they had again and again made that attempt they had failed.'); and see *Marsh v Jelf* (1862) 3 F & F 234; *Robinson v Mollett* (1875) LR 7 HL 802 at 818 per Brett J; *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901; paras 675 text and note 5, 676 post; but for cases where knowledge may be imputed to a principal employing a broker cf para 674 post. See also *Clerke v Martin* (1702) 2 Ld Raym 757 at 758 per Holt CJ (disapproving 'the setting up a new sort of specialty, unknown to the common law, and invented in Lombard-street, which attempted in these matters ... to give laws to Westminster Hall').

7 *Oppenheim v Russell* (1802) 3 Bos & P 42 (alleged usage for carriers to retain goods as a lien against the consignees held ineffective to prevent the consignor stopping in transitu; the result could not be achieved by agreement, and therefore it could not be achieved by usage); *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 386 per Blackburn J ('Where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage').

8 See PARA 604 ante.

9 *Rann v Hughes* (1779) 7 Term Rep 350n, HL, reversing *Pillans v Van Mierop* (1765) 3 Burr 1663 (where Lord Mansfield held that 'A nudum pactum does not exist, in the usage and law of merchants'), though without explicit reference to the 'usage and law of merchants'; 5 Williston on Contracts (3rd Edn) s 655; and cf *Potter v Pearson* (1702) 2 Ld Raym 759 (alleged custom to bind a man to pay money without consideration, held void).

On the other hand, there is no similar objection to a usage that a particular kind of agreement should not be treated as a contract: eg *Dean's Case* (1714) Viner Abr, Counsellor, (A) 22; *Thornhill v Evans* (1742) 2 Atk 330 at 332; and *Kennedy v Broun* (1863) 13 CBNS 677 (by the usage of the profession the retainer of a barrister is not a contract); *The Harriot* (1842) 1 Wm Rob 439 (usage in South Sea fishery for vessels to render assistance without an implied contract for salvage being made); *Dunlop v Higgins* (1848) 1 HLC 381 (usage that acceptances which do not arrive in course of post are ineffective); *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712 at 716, [1957] 1 WLR 932 at 935 per Barry J (general custom or usage as to what work a builder normally does gratuitously when invited to tender).

10 *Todd v Reid* (1821) 4 B & Ald 210; *Scott v Irving* (1830) 1 B & Ad 605; *Gibson v Crick* (1862) 1 H & C 142; *Daun v City of London Brewery Co* (1869) LR 8 Eq 155 at 162 per James V-C; *Bradburn v Foley* (1878) 3 CPD 129 at 133 per Lindley J; *Blackburn and Gibbs v Hamblet* [1900] 2 QB 18 at 27 per Kennedy J ('The usage ... cannot create contractual rights between parties where none exist according to legal principle'); *Young v Canadian Northern Rly* [1931] AC 83, PC; *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] 2 All ER 83 at 86, PC.

11 *Loader v London Docks Co* (1891) 65 LT 674.

12 *Daun v City of London Brewery Co* (1869) LR 8 Eq 155 at 161 per James V-C (rejecting an alleged usage to alter the terms of a mortgage subsequently to its creation, in a manner which would harm a second mortgagee; this would also have contravened the Statute of Frauds 1677).

13 *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA, per Kay LJ.

14 *British Leyland Motor Corpn Ltd v Armstrong Patents Co Ltd* [1982] FSR 481 at 493 per Foster J, affd on other grounds [1986] RPC 279, HL.

15 *Gulf Refining Co v Universal Insurance Co*, 32 F 2d 555 (1929); 5 Williston on Contracts (3rd Edn) 12 s 649n.

16 See eg *Catley v Wintringham* (1792) Peake 202 (contractual negligence); *Turley v Thomas* (1837) 8 C & P 103 (rule of the road); *Marshall v Lindsey County Council* [1935] 1 KB 516; *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582; *Sidaway v Bethlem Royal Hospital* [1985] AC 871, [1985] 1 All ER 643, HL. In the United States, the language of custom is more freely used in this connection, especially because of the doctrine that the standard of care may vary according to local usage. Note also the Canadian decision in *Stein v The Kathy K* [1976] 1 Lloyd's Rep 153 (ignorance of the usage of a bay as to the use of tow-ropes treated as evidence of negligence).

17 Thus, failure to conform with a traditional practice does not necessarily amount to negligence: *Brown v Rolls Royce Ltd* [1960] 1 All ER 577, [1960] 1 WLR 210, HL. See also *Bimberg v Northern Pacific Rly* 14 NW 2d 410 (1944) per Streissguth J ('Local usage and custom, either singly or in combination, will not justify or excuse negligence. They are merely foxholes in one of the battlefields of law, providing shelter, but not complete protection against charges of negligence').

18 Eg *Waite v Government Communications Headquarters* [1983] 2 AC 714, [1983] 2 All ER 1013, HL (meaning of 'normal retiring age' may depend on practice).

19 See PARA 650 note 14 ante.

20 *Hurley v Milward* (1839) Jo & Car 224; *George v Davies* [1911] 2 KB 445. In a good many of the ninteenth-century reported cases on usage, the usage was not mentioned in the declaration or the plea. It is, however, necessary to plead the effect of a usage (such as a special meaning, or a term to be implied): *Gwilliam v Daniell* (1835) 2 Cr M & R 61; *Metzner v Bolton* (1854) 9 Exch 518; *Sutton & Co v Ciceri & Co* (1890) 15 App Cas 144 at 152, HL, per Lord Watson; cf *Powell v Horton* (1836) 2 Bing NC 668 at 675 per Tindal CJ (not necessary to plead meaning if plaintiff sets out words used and alleges breach of the contract as pleaded). It has in consequence sometimes been found convenient to plead the usage itself as a fact.

Practice has varied as to the manner of pleading a usage. The following expressions have been used in pleading usages obtaining in London: *Whittaker v Mason* (1835) 2 Bing NC 359 ('course of dealing and usage' of London book-dealers); *Stewart v Aberdein* (1838) 4 M & W 211 ('usage and custom used and approved among merchants' in London); *Milward v Hibbert* (1842) 3 QB 120 ('known and approved usage and custom of trade' between London and Waterford); *Partridge v Bank of England* (1846) 9 QB 396 at 398, Ex Ch ('usage and custom of bankers and merchants used and approved in London for divers, to wit 60, years now last past'); *Phillipps v Briard* (1856) 1 H & N 21 ('well established and universal custom' of merchants in London); *Houlder v General Steam Navigation Co Ltd* (1862) 3 F & F 170 ('known usage of port of London').

21 There are very few cases before the last quarter of the eighteenth century, when the law of evidence began to develop. The principal context of the first legal questions about usage was the extrinsic evidence rule: see *Ross v Thwaite* (1776) 1 Park on Marine Insurance (8 Edn) 23; cited 3 E & E 313; and *Wigglesworth v Dallison* (1779) 1 Doug KB 201; overruling, on the evidence point, *Trumper v Carwardine* (1767) 1 Doug KB 202. For the extrinsic evidence rule, which dominates much of the later case law as well, see PARAS 665-670 post.

22 See *Anon* (1507) Keil 87, pl 3 (translated: 'in some places a hundred sheep contain five score, and in some six score ... and every bargain for such a thing shall have relation to the custom of the country where it is made'); *Barksdale v Morgan* (1693) 4 Mod Rep 185 at 186; *Tierney v Etherington* (1743) 1 Burr 348 at 349 per Lee CJ (charterparty to be construed 'according to the course of trade in this place'); *Baker v Paine* (1750) 1 Ves Sen 456 at 459 per Lord Hardwicke LC; *Blunt v Cumyns* (1751) 2 Ves Sen 331 per Lord Hardwicke LC. Local usages would obviously have been within the knowledge of ordinary juries; in mercantile cases, the practice by the eighteenth century was to strike a special jury with mercantile experience.

652. Scope of usages.

A usage may exist in any trade[1], occupation, profession, or branch of commercial or mercantile life[2], and between parties bearing certain contractual or even domestic relationships to one another, either generally throughout the kingdom[3] or in a sphere extending beyond the limits of the realm[4], or in a trade operating between England and a place overseas[5], or within some local area, however small[6]. A usage may be incorporated in a contract even though it is not the usage of the place where the contract was made[7].

A usage may exist in respect of a very limited class[8], and may be confined to a very limited area[9]. The area may even be the property of, and controlled by, one person[10]. A usage of a port cannot be established, however, merely by three or four important classes of persons in the community of a port agreeing that it is desirable[11]. Nor will a usage be established merely because it is observed by many members of a particular trade, if it is not universal[12].

1 *Vallence v Dewar* (1808) 1 Camp 503 (Newfoundland fishing trade); *Yates v Pym* (1816) 6 Taunt 446 (bacon trade); *Whittaker v Mason* (1835) 2 Bing NC 359 (London bookselling trade); *Johnston v Usborne* (1840) 11 Ad & El 549 (corn trade); *Plaice v Allcock* (1866) 4 F & F 1074 (bleaching trade); *Chawner v Cummings* (1846) 8 QB 311 (glove trade); *Myers v Sarl* (1860) 3 E & E 306; *Gorrissen v Perrin* (1857) 2 CBNS 681 (gambier trade, gambier being a species of drug); *Howard v Sheward* (1866) LR 2 CP 148 (horse dealing trade); *Cropper v Cook* (1868) LR 3 CP 194 (wool trade); *Fleet v Murton* (1871) LR 7 QB 126 (fruit trade); *Johnson v Raylton* (1881) 7 QBD 438, CA (iron trade); *North v Bassett* [1892] 1 QB 333 (building trade); and see PARAS 687-688 post.

2 *Palmer v Blackburn* (1822) 1 Bing 61 (insurance brokers); *Murray v Currie* (1836) 7 C & P 584 (estate agents); *Moon v Witney Union Guardians* (1837) 3 Bing NC 814; *Burnett v Bouch* (1840) 9 C & P 620 (shipping brokers); *Grant v Maddox* (1846) 15 M & W 737 (actors); *Alston v Herring* (1856) 11 Exch 822 (shipping merchants); *Re Page (No 3)* (1863) 32 Beav 487 (auctioneers); *Imperial Marine Insurance Co v Fire Insurance Corpn* (1879) 4 CPD 166 (underwriters); *Crawcour v Salter* (1881) 18 ChD 30, CA (hotel keepers); *Harris v Truman* (1882) 9 QBD 264, CA (malting agents); *Knox and Robb v Scottish Garden Suburb Co Ltd* 1913 SC 872 (architects); and see PARAS 689-690 post.

3 *Hutton v Warren* (1836) 1 M & W 466 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 210); *Moult v Halliday* [1898] 1 QB 125 (masters and domestic servants); *Metzner v Bolton* (1854) 9 Exch 518 (commercial travellers); *Helps v Clayton* (1864) 17 CBNS 553 (a man and his intended wife); *Universo Insurance Co of Milan v Merchants Marine Insurance Co* [1897] 2 QB 93, CA (Lloyd's underwriters); *Mount v Oldham Corpn* [1973] QB 309, [1973] 1 All ER 26, CA (schoolteachers and parents). In this respect, it differs from custom, which must be local.

4 *Dale v Humfrey* (1858) EB & E 1004; *Goodwin v Robarts* (1876) 1 App Cas 476, HL (usage of merchants in many countries to treat certain scrip and bonds of foreign governments as negotiable instruments); *Lickbarrow v Mason* (1787) 6 East 20n; revsd on the facts, sub nom *Mason v Lickbarrow* (1790) 1 Hy Bl 357, HL (usage amongst merchants and shippers generally to treat bills of lading as passing the property in the goods contained in them); *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 at 129, [1958] 1 All ER 262 at 263, CA, per Jenkins LJ (effect of irrevocable credits determined by general usage, apparently world-wide); followed in *RD Harbottle Mercantile Ltd v National Westminster Bank Ltd* [1978] QB 146 at 155, [1977] 2 All ER 862 at 870 per Kerr J. See also the Uniform Laws on International Sales Act 1967; and PARA 650 note 4 ante. And see *Amin Rasheed Shipping Corpn v Kuwait Insurance Co* [1982] 1 WLR 961; affd [1983] 1 All ER 873, [1983] 1 WLR 228, CA (world-wide usage showing that an English standard form of marine policy is used in many parts of the world, so that its adoption does not necessarily imply a choice of English law).

5 Eg *Pelly v Royal Exchange Insurance Co* (1757) 1 Burr 341 (usage affecting all European ships on the China voyage except Dutch ones); *Eddowes v Hopkins* (1780) 1 Doug KB 376 (usage of the American trade); *Cormack v Gladstone* (1809) 11 East 347 (usages of the shipping trade between the Baltic and America); *Taylor v Briggs* (1827) 2 C & P 525 (usage in the cotton trade between Liverpool and Alexandria); *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC (usage of the shipping trade between Sarawak and Singapore, that mates' receipts were treated as documents of title to goods).

6 As, for instance, among persons engaged in mining operations in a particular locality (*Clayton v Gregson* (1836) 5 Ad & El 302); between landlords and tenants in certain localities (see PARA 663 post); among those engaged in a specific trade in a particular town or its neighbourhood (*Plaice v Allcock* (1866) 4 F & F 1074

(bleaching trade in Nottingham region); *Re Hancock, ex p Ludlow* [1879] WN 65 (Bristol wine trade); *Lord Eldon v Hedley Bros* [1935] 2 KB 1); or among shippers in certain ports (*Norden Steamship Co v Dempsey* (1876) 1 CPD 654; *Brown v Byrne* (1854) 3 E & B 703); or in relation to the discharge at a particular port of cargoes of wheat from certain ports (*Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134, HL). See also *Senior v Armytage* (1816) Holt NP 197 (where a usage for the tenant of a farm in a particular district to provide labour, tillage, sowing, and all materials for cultivation in his away-going year, and for the landlord to compensate him accordingly, was found to prevail only in the immediate neighbourhood of the defendant's estates and to be almost confined to those estates). Customs of the country (as to which see PARA 663 post) are examples of local usages.

7 Eg a charterparty made in England may be subject to the usages of the port of loading: *Bottomley v Forbes* (1838) 5 Bing NC 121; *Cuthbert v Cumming* (1855) 11 Exch 405; *Pust v Dowie* (1864) 5 B & S 20.

8 *Temple, Thomson and Clarke v Runnalls* (1902) 18 TLR 822, CA (where a usage as to the loading of stone cargoes was confined to the only shipper of stone from the port); but see *Lawson v Burness* (1862) 1 H & C 396 (where the jury found that a vessel was loaded according to the practice of a colliery, but that such practice was not an established or known usage); and see also *Cazalet v Morris & Co* 1916 SC 952.

A usage which is confined to the parties is normally referred to as a course of dealing. For the incorporation of additional terms (such as exclusion clauses) by reference to a consistent course of previous dealing between the same parties see *Rushforth v Hadfield* (1806) 7 East 224; *Bourn v Gatliff* (1844) 11 Cl & F 45, HL; *Cumming v Shand* (1860) 5 H & N 95; *Spurling v Bradshaw* [1956] 1 WLR 461; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA; cf *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL (where the course of dealing was irregular); and see CONTRACT vol 9(1) (Reissue) PARA 801.

9 *The Sheila* [1909] P 31n, where the usage was confined to the jetties of a railway company in the port of Fowey; cf, however, *Lawson v Burness* (1862) 1 H & C 396; and see *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC, cited in note 5 supra.

10 *Temple, Thomson and Clarke v Runnalls* (1902) 18 TLR 822, CA.

11 *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292 at 295 per Kennedy J.

12 *Wood v Wood* (1823) 1 C & P 59 per Burrough J (trade usage must be uniform and universal, and not merely the way of dealing at certain houses); *Gabay v Lloyd* (1825) 3 B & C 793 (usage of insurers at Lloyd's Coffee House not binding on a party who was unaware of it, because it was not found by the jury to be the usage of the whole insurance trade in London); *Lloyd's Bank Ltd v Swiss Bankverein* (1913) 108 LT 143 at 145, CA, per Farwell LJ (the practice of a number of firms is not the same as a trade usage); and see PARA 675 text and note 5 post (as to Lloyd's). See also *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11 at 18, HL, per Lord Watson (a habit of breaking contracts over a period does not establish a usage).

653. Effect upon contractual obligations.

Where persons enter into contractual obligations with one another under circumstances governed by a particular usage, then that usage, when proved, must be considered as part of the agreement[1]. The contract expresses what is peculiar to the bargain between the parties, and the usage supplies the rest[2]. This is the case even where the agreement is in writing[3]. Although the usage is unwritten it is to be treated exactly as if that unwritten customary clause had been written out at length[4]. The parties to a contract of sale of goods to which the Uniform Law on the International Sale of Goods applies are bound (1) by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves; (2) by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract; it is further provided that in the event of conflict with the Uniform Law the usages will prevail unless otherwise agreed by the parties[5].

Usages may operate on a contract in different ways. A usage may add collateral terms which were not expressed by the parties, provided that they are consistent with the express agreement[6]; or it may aid the interpretation of express terms in a contract, either when they are ambiguous on their face or where the words are used in a special or technical sense[7]; or it may explain the purport of a new form of commercial transaction or instrument[8].

1 *Clark v Smallfield* (1861) 4 LT 405 per Cockburn CJ; *Metzner v Bolton* (1854) 9 Exch 518 at 521 per Parke B; and see *Hutchinson v Tatham* (1873) LR 8 CP 482. An implied condition or warranty as to quality or fitness for a particular purpose may be annexed by usage to a contract for the sale, hire-purchase, hire or other transfer of goods: see the Supply of Goods (Implied Terms) Act 1973 s 10(4) (as substituted); the Sale of Goods Act 1979 s 14(4) (as amended); the Supply of Goods and Services Act 1982 ss 4(7), 9(7); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 24; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 83, 88. Where any right, duty or liability would arise under such a contract for the supply of goods, by implication of law, it may, subject to certain exceptions and limitations, be negatived or varied by express agreements or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract: see the Sale of Goods Act 1979 s 55(1); the Supply of Goods and Services Act 1982 s 11(1); and see eg *Cointat v Myham & Son* (1914) 84 LJKB 2253 (where there was a usage to sell meat without any implied warranty as to quality, the Sale of Goods Act 1893 s 14 (now repealed and replaced) did not apply). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 12, 39, 100. The terms implied by law in a contract for the supply of services may be excluded by usage: Supply of Goods and Services Act 1982 s 16(1). See also the Marine Insurance Act 1906 s 87, which provides that any right, duty or liability which would arise under a contract of marine insurance by implication of law (including any right, duty or liability declared by the Act which may be lawfully modified by agreement) may be negatived or varied by usage if the usage is such as to bind both parties to the contract; and see INSURANCE.

2 *Meyer v Dresser* (1864) 16 CBNS 646 at 660-661 per Erle CJ; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314 at 324, HL, per Lord Atkinson ('The language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or verbal, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that usage and intended that the usage or custom should form part of it').

3 *Gibson v Small* (1853) 4 HL Cas 353 at 397 per Parke B; *Wilkins v Wood* (1848) 17 LJQB 319 at 320 per Lord Denman CJ; *Smith v Wilson* (1832) 3 B & Ad 728. See further PARA 666 post.

4 *Tucker v Linger* (1883) 8 App Cas 508 at 511, HL, per Lord Blackburn; *Meyer v Dresser* (1864) 16 CBNS 646 at 660 per Erle CJ.

5 Uniform Laws on International Sales Act 1967 s 1(2), Sch 1, art 9(1), (2). For further provisions set out in that Act which refer to usages see Sch 1, arts 8, 20, 21, 25, 38(4), 50, 60, 61(2), 69; s 2(1), Sch 2, arts 2(1), 4(2), 5(3), 6(2), 11, 13(1); and see PARA 650 text and note 4 ante. See also CONTRACT vol 9(1) (Reissue) PARAS 625, 684; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 382.

6 See PARAS 666-667 post.

7 See PARAS 669-670 post.

8 Eg *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 at 129, [1958] 1 All ER 262 at 263, CA, per Jenkins LJ (bankers' irrevocable credits; followed in *RD Harbottle Mercantile Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862); *Customs and Excise Comrs v Guy Butler (International) Ltd* [1977] QB 377 at 382, [1976] 2 All ER 700 at 702, CA, per Megaw LJ (negotiable certificates of deposit); *Re Charge Card Services Ltd* [1987] Ch 150 at 158, [1986] 3 All ER 289 at 304 per Millett J (affd [1989] Ch 497, [1988] 3 All ER 702, CA) (credit cards).

UPDATE

653 Effect upon contractual obligations

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(1) SCOPE, EFFECT AND EXTINGUISHMENT OF USAGES/654. Express or implied exclusion of usage.

654. Express or implied exclusion of usage.

It is competent for the parties, notwithstanding that the case would otherwise be governed by a usage, to exclude the operation of the usage[1], or to modify its application either by express stipulation[2] or impliedly by provisions inconsistent with that usage[3].

1 *Gibson v Small* (1853) 4 HL Cas 353 at 397 per Parke B; *Brenda Steamship Co v Green* [1900] 1 QB 518, CA (exclusion of usage of the port in a charterparty); *Palgrave, Brown & Son Ltd v SS Turid (Owners)* [1922] 1 AC 397, HL; see also *Tucker v Linger* (1883) 8 App Cas 508, HL. For an express exclusion of usage see *Brenda Steamship Co v Green* [1900] 1 QB 518, CA.

2 *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83, CA; and see *Meek v Port of London Authority* [1918] 2 Ch 96, CA.

3 *Dale v Humfrey* (1858) EB & E 1004; *Parker v Ibbetson* (1858) 4 CBNS 346; *Krall v Burnett* (1877) 25 WR 305; *Tucker v Linger* (1883) 8 App Cas 508, HL; *Vickery's Patents Ltd v Hill* (1917) 33 TLR 536; *Westacott v Hahn* [1918] 1 KB 495 at 514, CA; see also the cases in para 667 note 2 post. For an instance of a practice of shipowners to commit breaches of the charterparties and pay compensation in case of loss see *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, HL; and *Apollinaris Co v Nord Deutsche Insurance Co* [1904] 1 KB 252. See further PARA 667 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(1) SCOPE, EFFECT AND EXTINGUISHMENT OF USAGES/655. Extinguishment of usage.

655. Extinguishment of usage.

Since usage is based purely upon habitual practice, it follows that by disuse of the practice a usage may lose its notoriety and disappear[1]. Desuetude does not necessarily occur merely because persons frequently contract themselves out of the usage, but if the practice of contracting out becomes so general that the adoption of the usage becomes the exception rather than the rule, the usage becomes thereby extinguished[2]. A usage may be extinguished by the gradual adoption of another usage[3] which is inconsistent with it[4]. An event such as a large-scale war often has the effect of extinguishing usages either by causing altered trade conditions resulting in their lapse or else by leading to the adoption of new usages in place of the former ones[5]. The court will sometimes take judicial notice that general usages have changed or disappeared[6]. Where a usage is codified in a written regulation of a trade association[7], it may be extinguished or modified simply by rescinding or altering the regulation[8].

Now that many commercial contracts expressly incorporate universal standard terms, the existence of trade usages in those areas must continually diminish[9].

1 *Moult v Halliday* [1898] 1 QB 125 at 130 per Channell J.

2 *Ropner & Co v Stoate, Hosegood & Co* (1905) 92 LT 328 at 332 per Channell J, approved in *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310 at 339, CA, per Lawrence LJ.

3 In *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 at 553, [1968] 2 All ER 886 at 889, CA, Lord Denning MR said: 'I do not think that usage of 100 years ago applies today. Overseas business is conducted very differently now from what it was then'. The court held that in the light of modern usage an undisclosed foreign principal could sue and be sued upon a contract made on his behalf by an English agent save when the contract on its true construction excluded the foreign principal. See further PARA 663 note 2 post; and AGENCY.

4 *Moult v Halliday* [1898] 1 QB 125.

5 *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348 at 363, CA, per Scrutton LJ.

6 See *Hamilton v Bell* (1854) 10 Exch 545 at 550 per Pollock CB, where it is said to have been notorious in 1854 that manufacturers sometimes hired machinery, whereas it was not so when a previous case was decided in 1823.

7 See PARA 687 post.

8 Thus, in 1968 the Association of Loss Adjusters rescinded an earlier usage of Lloyd's as to voluntary stranding, and replaced it by a rule based on a clause of the York-Antwerp Rules.

9 The existence of express terms to the same effect as a supposed usage is evidence that the usage does not exist (see PARA 681 text and note 6 post), while some standard sets of terms expressly exclude the operation of contrary usage. The tendency of standard forms to prevent the establishment of usage was noted as long ago as 1926 by AT Wright in 26 Columbia Law Rev 917 at 930; see also Sir Patrick Devlin in 14 MLR at 252. As to standard form contracts see CONTRACT vol 9(1) (Reissue) PARA 771.

(2) CHARACTERISTICS OF USAGE

656. In general.

Every usage, whether in respect of a particular trade, branch of business or occupation, and whether affecting land or not, must be notorious, certain, and reasonable, and it must not offend against the intention of any legislative enactment[1]. If a usage is not general, or is unreasonable, it can only bind a person who has actual notice of it and enters into the contract on that footing[2]. It is no objection to a usage that it cannot be shown to have existed from time immemorial, and evidence of such antiquity is not required[3]. It is not so much a question of the length of time that a usage has existed as the notoriety which it has gained that must be considered in determining whether or not a particular usage applies in a particular case[4], for usage, however recent, may be valid provided it is generally known[5]. On the other hand, even long usage will not suffice if the other requisites are lacking[6].

1 This passage was cited with approval in *General Reinsurance Corpn v Forsakringaktienbolaget Fennia Patria* [1983] QB 856 at 872, [1983] 2 Lloyd's Rep 287 at 295, CA, per Kerr LJ; and see, to the same effect, *Bank of India v Patel* [1982] 1 Lloyd's Rep 506 at 515 per Bingham J; *Eggar Forrester Offshore Ltd v Hong Kong United Dockyards Ltd, The Energy Searcher* [1987] 1 Lloyd's Rep 493 at 501. For judicial dicta upon the general essential characteristics of a valid usage see *Nelson v Dahl* (1879) 12 ChD 568 at 575, CA, per Jessel MR; *Devonald v Rosser & Sons* [1906] 2 KB 728 at 743, CA, per Farwell LJ; *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA, per Kay LJ; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134 at 136, HL, per Lord Buckmaster LC; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 572, [1967] 1 WLR 1421 at 1438 per Ungoed-Thomas J; *North and South Trust Co v Berkeley* [1971] 1 All ER 980 at 990, [1971] 1 WLR 470 at 482 per Donaldson J. See also PARA 650 ante; and *Brown v IRC* [1965] AC 244 at 262, [1964] 3 All ER 119 at 125, HL, per Lord Evershed. As to usages which conflict with legislation see PARA 661 post.

2 *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333 at 343 per Lord Watson; and as to unreasonable usages see PARA 659 post.

3 *Sewell v Corp* (1824) 1 C & P 392 at 393 per Best CJ; *Juggomohun Ghose v Manickchund* (1859) 7 Moo Ind App 263 at 282, PC per Sir John Coleridge; *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA, per Kay LJ.

4 *Moult v Halliday* [1898] 1 QB 125 at 130 per Channell J. See also *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bigham J ('the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly

than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more transactions in an hour than there were in a week a century ago'); this case concerned the incident of negotiability under the law merchant, as to which see PARA 664 post.

5 *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 386 per Blackburn J.

6 *FE Hookway & Co Ltd v Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep 491 at 510 per Devlin J.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(2) CHARACTERISTICS OF USAGE/657. Notoriety.

657. Notoriety.

Every usage must have acquired such notoriety in the particular market or branch of trade, or in the department of business or of everyday life, or amongst the class of persons, who are affected by it, or in the locality where it obtains, that any person in that branch, department, class, or place, who enters into a contract of a nature affected by the usage must be taken to have done so with the intention that the usage should form part of the contract[1]. Notoriety in this connection does not mean that it must be known to all the world, nor even that it should be known to the person against whom it is asserted[2]; but it means that it must be well known in the context where it applies, and be capable of ready ascertainment by any person who proposes to enter into a contract of which that usage would form part[3].

1 *R v Stoke-upon-Trent Inhabitants* (1843) 5 QB 303 at 307 per Lord Denman CJ, and at 308 per Coleridge J; *Re Goetz, Jonas & Co, ex p Trustee* [1898] 1 QB 787 at 795, CA, per AL Smith LJ; *Nelson v Dahl* (1879) 12 ChD 568 at 575, CA, per Jessel MR; *Devonald v Rosser & Sons* [1906] 2 KB 728 at 743, CA, per Farwell LJ; *Plaice v Allcock* (1866) 4 F & F 1074; *Rainy v Vernon* (1840) 9 C & P 559; *Holderness v Collinson* (1827) 7 B & C 212 at 216 per Bayley LJ; and cf *Corbin v Stewart* (1911) 28 TLR 99 (doctor should have given notice of intention to charge fees to doctor's widow); *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL (alleged custom among solicitors in Scotland to retain interest received from moneys on deposit from clients' accounts not established). As to the express or implied exclusion of usages see PARA 654 ante.

Many cases on the notoriety of usages were decided in the context of the doctrine of reputed ownership in the law of bankruptcy, which was introduced by the Bankruptcy Act 1623, continued by the Bankruptcy Act 1914 s 38 (repealed), and abolished by the Insolvency Act 1985 (now largely repealed and replaced by the Insolvency Act 1986). See, eg, *Mullett v Green* (1838) 8 C & P 382; *Hamilton v Bell* (1854) 10 Exch 545; *Re Coustan, ex p Watkins* (1873) 8 Ch App 520; *Re Jones, ex p Lovering* (1874) 9 Ch App 621; *Re Matthews, ex p Powell* (1875) 1 ChD 501, CA; *Re Hill* (1875) 1 ChD 503n; *Re Witt, ex p Shubrook* (1876) 2 ChD 489, CA; *Re Florence, ex p Wingfield* (1879) 10 ChD 591, CA; *Re Woodward, ex p Huggins* (1886) 54 LT 683; *Re Goetz, Jonas & Co, ex p Trustee* [1898] 1 QB 787, CA; *Re Torrens, ex p John Marston's Carriage Works Ltd* [1924] 2 IR 1; and (with respect to boarding houses and hotels) see PARA 686 text and note 12 post. These decisions may still be of authority in the law of distress, but it cannot be assumed that they are necessarily of authority in the context of implied terms in contracts, since the usages concerned are not of an obligatory character: see PARA 650 text and note 14 ante.

2 See PARA 672 post.

3 *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134 at 136, HL per Lord Buckmaster LC; and cf *Bank of India v Patel* [1982] 1 Lloyd's Rep 506 at 515 per Bingham J (a usage must be well known to those familiar with the market).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(2) CHARACTERISTICS OF USAGE/658. Certainty.

658. Certainty.

Every usage must be certain[1]. It must be uniform as well as reasonable[2], and in order to be incorporated as a term in a written contract it must have just as much certainty as the written contract itself[3].

A usage is not, however, bad for uncertainty merely because it depends in its operation upon what a tribunal thinks to be reasonable[4].

1 *Sewell v Corp* (1824) 1 C & P 392 at 393 per Best CJ; *Devonald v Rosser & Sons* [1906] 2 KB 728 at 743, CA, per Farwell LJ; *Cooper v Strauss* (1898) 14 TLR 233; *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 at 159 per Channell J; *Daun v City of London Brewery Co* (1869) LR 8 Eq 155; *Harker v Edwards* (1887) 57 LJQB 147 at 148, CA, per Lord Esher MR; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134 at 138, HL, per Lord Buckmaster LC, and at 140 per Lord Shaw; *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, CA.

2 *Wood v Wood* (1823) 1 C & P 59 per Burrough J. As to universality see PARA 652 note 12 ante.

3 *Nelson v Dahl* (1879) 12 ChD 568 at 575 per Jessel MR; and see *Johnson v Crédit Lyonnais Co* (1877) 2 CPD 224; affd 3 CPD 32, CA; *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL. Note also *Fielding v Moiseiwitsch* (1946) 174 LT 265 at 269, affd on another point (1946) 175 LT 265, CA (alleged usage that musicians are excused from performance if illness or indisposition renders them unable to perform to their usual standard; the usage was found not to be established on the facts, partly because it would render contracts with performers very uncertain).

4 *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 (where a usage in the London corn trade preventing buyers from rejecting grain for difference or variation in quality, unless it was excessive or unreasonable and so found by arbitration under the contract, was held not to be bad on the ground of uncertainty).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(2) CHARACTERISTICS OF USAGE/659. Reasonableness.

659. Reasonableness.

A usage will only be incorporated into a contract if it is reasonable[1]. In some cases unreasonableness has been confused with repugnancy[2], and in others with the principle that usage cannot change the law or give rise to legal obligations independently of contract[3]. But it is a different concept. Legislation apart, there is no reason why contracting parties should not agree to be bound by unreasonable terms if they so choose, and they may therefore bind themselves to an unreasonable usage if their consent is real and explicit[4]. On the other hand the parties may not, even by express agreement, change the law. The role of reasonableness is not, therefore, to control the parties' own agreement. It is rather that, in the absence of an explicit agreement, usages may only be incorporated into contracts on the basis of implied consent, and no one can be taken to have tacitly consented to something unreasonable[5].

It has been said that the question whether a usage is reasonable is a question of law, as in the case of local custom[6], and judges sometimes directed juries as to whether an alleged custom was reasonable[7]. However, whether a usage exists is a question of fact, and evidence which tends to show that an alleged usage would be unreasonable is material as tending to show that such a usage does not exist[8].

1 *Dalby v Hirst* (1819) 1 Brod & Bing 224; *The Cognac* (1832) 2 Hag Adm 377 at 390 per Robinson JA ('such a custom of a particular country would have very little effect against foreigners, unless it is reasonable and just'); *Harrison v Universal Marine Insurance Co* (1862) 3 F & F 190 at 194 per Mellor J; *Tucker v Linger* (1883) 8 App Cas 508 at 513, HL, per Lord Blackburn; *Perry v Barnett* (1885) 15 QBD 388 at 393 per Brett MR ('the courts have always taken upon themselves to consider whether a custom is or not within the bounds of reason', referring to trade usages); *Davis & Co v Howard* (1890) 24 QBD 691 at 693 per Charles J; *Sea Steamship Co v*

Price, Walker & Co (1903) 8 Com Cas 292; *Ropner & Co v Stoate, Hosegood & Co* (1905) 92 LT 328 at 330 per Channell J; *Devonald v Rosser & Sons* [1906] 2 KB 728.

2 *Sweeting v Pearce* (1861) 9 CBNS 534 at 540, 541, Ex Ch, per Bramwell B; *Robinson v Mollett* (1875) LR 7 HL 802, HL; *Perry v Barnett* (1885) 15 QBD 388 at 393, 397 per Brett MR; *Leopold Walford (London) Ltd v Affréteurs Réunis Société Anonyme* [1918] 2 KB 498 at 507 per Scrutton LJ (alleged custom to disregard the express terms of the contract, held to be 'absolutely unreasonable'; affd sub nom *Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801, HL; *Re Colin Williams (Insurance) Pty Ltd* [1975] 1 NSWLR 130 at 136. As to repugnancy see PARA 667 post.

3 *Bradburn v Foley* (1878) 3 CPD 129 at 133 per Lindley J. For the principle see PARA 651 ante.

4 *Stewart v West India and Pacific Steamship Co* (1873) LR 8 QB 88 (the clause 'Average, if any, to be adjusted according to British custom' held to incorporate the usage of British average adjusters, though unjust, vicious and unreasonable); *Blackburn v Mason* (1893) 68 LT 510, CA, per Lord Esher MR ('A person may agree to be bound by an unreasonable custom of a market, but he is only bound if, when he entered on the dealing, the custom was made known to him, and he agreed to be bound'); *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 573, [1967] 1 WLR 1421 at 1439 per Ungoed-Thomas J. The effect of an unreasonable usage may, however, be modified by the Unfair Contract Terms Act 1977: see CONTRACT vol 9(1) (Reissue) PARA 820 et seq.

5 *Scott v Irving* (1830) 1 B & Ad 605 at 612 per Lord Tenterden CJ; *Hathesing v Laing* (1873) LR 17 Eq 92; *Neilson v James* (1882) 9 QBD 546 at 552, CA, per Brett LJ ('the plaintiff is only bound by such a custom as is both reasonable and legal, for to that extent only can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it'); *Perry v Barnett* (1885) 15 QBD 388 at 393 per Brett MR ('if the custom is unreasonable the courts have said they will not recognise it as binding on people who do not know it, and who have not consented to act upon it'); *Harker v Edwards* (1887) 57 LJQB 147 at 148 per Lord Esher MR ('if the rule were ... unreasonable, it would not make the defendant liable if he did not know of it'). See further PARA 674 post.

6 *Bradburn v Foley* (1878) 3 CPD 129 at 135 per Lindley J, citing *Tyson v Smith* (1838) 9 Ad & El 406 at 421 per Tindal CJ, which was a case of local custom. See also *Mousley v Ludlam* (1851) 21 LJQB 64 at 65 per Erle J.

7 Eg *Sanders v Jameson* (1848) 2 Car & Kir 557 at 559 per Rolfe B (usage that when corn is sold by sample, and the buyer does not on the day of sale examine the bulk and reject it, the buyer cannot subsequently reject or refuse to pay the full price; held reasonable); *Plaice v Allcock* (1866) 4 F & F 1074 at 1076 per Willes J (usage for Nottingham bleachers to have a general lien over goods send to them for bleaching; held reasonable); *The County of Salop* (1886) cited 92 LT at 331. In *Moult v Halliday* [1898] 1 QB 125, Hawkins J seems to have treated it as a question of fact, and Channell J as a question of law.

8 *Bottomley v Forbes* (1838) 5 Bing NC 121 at 128 per Tindal CJ. The question of reasonableness seems frequently to have been left to the jury: eg *Senior v Armytage* (1816) Holt NP 197; and *Dalby v Hirst* (1819) 1 Brod & Bing 224 at 236; *Paxon v Courtnay* (1860) 2 F & F 131; *Alexiadi v Robinson* (1861) 2 F & F 679 at 686; *Dunbar v Cardiff Philharmonic Music-Hall Co* (1893) 9 TLR 461.

UPDATE

659-662 Reasonableness ... Nature of the law merchant

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(2) CHARACTERISTICS OF USAGE/660. When usage is reasonable.

660. When usage is reasonable.

A usage is not reasonable unless it is fair and proper and such as reasonable, honest, and right-minded men would adopt[1]. A usage is unreasonable if it is one-sided[2], or offends against

fundamental ethical rules of right and wrong[3]. The court may decline to incorporate an unduly sweeping exclusion clause from usage on the ground of unreasonableness[4].

A usage, however, which is founded on the general convenience of all parties engaged in a particular department of business can never be said to be unreasonable[5], and where a usage has been sufficiently proved, there will be very few cases in which it will be held that the usage is unreasonable, for the fact that the usage has been established and followed tends to show that it is convenient[6]. A usage will be considered reasonable if it works to the benefit of both parties[7], or is in the general interest[8].

An arrangement which it would not be unreasonable for individual persons to adopt by express agreement, would not be unreasonable as a usage if adopted by a class of persons dealing in a particular commodity or engaged in a particular business[9].

1 *Paxton v Courtnay* (1860) 2 F & F 131 per Keating J; cited with approval in *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 2 KB 296 at 298 per Horridge J.

2 *Robinson v Mollett* (1875) LR 7 HL 802 at 818, HL, per Brett J, and at 831 per Grove J; *Devonald v Rosser & Sons* [1906] 2 KB 728 at 743, CA, per Farwell LJ; *Bank of India v Patel* [1982] 1 Lloyd's Rep 506 at 516 per Bingham J (alleged usage to close out a contract if not confirmed in writing within seven days, held unreasonable); but cf *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, CA (usage for certain employers to make deductions from wages for bad work, held by Farwell J to be contrary to natural justice, but held reasonable on appeal). Note also *Meek v Port of London Authority* (1918) 119 LT 196 at 198 (usage of employers to pay the income tax on their employees' wages held to be a form of bounty and therefore not incorporated into the contract). See further PARA 676 post.

3 *Robinson v Mollett* (1875) LR 7 HL 802 at 817, HL, per Brett J. Cf *A-G v Lindegren* (1819) 6 Price 287 at 311 per Richards CB (usage held to be 'contrary to every principle of equity, justice and morality'); *Leuckhart v Cooper* (1836) 3 Bing NC 99 at 107, 109 per Tindal CJ ('unreasonable, unjust and bad in law', and obviously prejudicial to foreign trade); *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 2 KB 296 at 301 per Rowlatt J ('It seems to me that before the court can say that a custom, not sought to be introduced against an ignorant purchaser, but known to both parties to the contract, is unreasonable, it has to say the custom outrages justice and common sense'); affd on appeal [1917] 1 KB 320, CA, the above dictum not being criticised; *Fullwood v Hurley* [1928] 1 KB 498 at 504, CA, per Scrutton LJ (usage for agent to have double brokerage without informing principal held unreasonable); *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311 at 323, [1969] 2 All ER 421 at 429 per Megaw J (a 'custom' will not be upheld if it contradicts the vital principle that an agent may not serve two masters); followed in *North and South Trust Co v Berkeley* [1971] 1 All ER 980 at 990, [1971] 1 WLR 470 at 482 per Donaldson J; *Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602 at 615 per Waller J.

4 *Young v WM Smith & Son* (1948) 81 Ll L Rep 274 at 276. Such an implied term would also now be subject to the provisions of the Unfair Contract Terms Act 1977: see CONTRACT vol 9(1) (Reissue) PARA 820 et seq.

5 *Grissell v Bristowe* (1868) LR 4 CP 36 at 48, Ex Ch, per Cockburn CJ.

6 *Goodwin v Robarts* (1875) LR 10 Exch 337 at 353 ('The univerality of a usage ... is conclusive proof of its being in accordance with public convenience'); *Moult v Halliday* [1898] 1 QB 125 at 130 per Channell J. See also *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 2 KB 296 at 301 per Rowlatt J ('If the persons engaged in this trade like to do that I cannot say it is unreasonable').

7 *Dalby v Hirst* (1819) 1 Brod & Bing 224 at 236 per Dallas CJ; *Moon v Witney Union Guardians* (1837) 3 Bing NC 814 at 818 per Tindal CJ; *Plaice v Allcock* (1866) 4 F & F 1074 per Willes J; *Moult v Halliday* [1898] 1 QB 125 at 128 per Hawkins J; *Aktieselskabet Hekla v Bryson, Jameson & Co* (1908) 100 LT 155 at 159 per Bray J; *A/S Sameiling v Grain Importers Eire Ltd* [1952] 2 All ER 315.

8 Eg, in the case of an agricultural usage, if it tends to encourage good husbandry: *Wigglesworth v Dallison* (1779) 1 Doug KB 201 at 207 per Lord Mansfield CJ; *Dalby v Hirst* (1819) 1 Brod & Bing 224 at 236 per Dallas CJ; *Tucker v Linger* (1883) 8 App Cas 508, HL. For a list of customs of the country which have been recognised as reasonable see AGRICULTURAL LAND vol 1 (2008) PARA 354.

On the importance of general convenience in matters of trade, and the advancement of commerce see Co Litt 182a; *Hankey v Jones* (1778) 2 Cowp 745 at 750 per Lord Mansfield CJ; *Brandao v Burnett* (1843) 6 Man & G 630 at 665 per Lord Denman CJ; *Goodwin v Robarts* (1875) LR 10 Exch 337 at 353, Ex Ch.

9 *Grissell v Bristowe* (1868) LR 4 CP 36 at 47 per Cockburn CJ. Cf *Mousley v Ludlam* (1851) 21 LJQB 64 at 65 per Erle J ('if it be not unreasonable as a contract, I do not see that it is unreasonable as a custom').

UPDATE

659-662 Reasonableness ... Nature of the law merchant

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(2) CHARACTERISTICS OF USAGE/661. Legality.

661. Legality.

A usage must be legal. No usage, however extensive, will be allowed to prevail if it is directly opposed to positive law, which for this purpose includes such universal[1] usages as, having been sanctioned and adopted by the courts, have become, by that adoption, part of the common law; for to give effect to a usage which involves a defiance of the law would be obviously contrary to fundamental principle[2]. Thus, action in accordance with a well-established usage cannot be pleaded as a defence to a criminal charge if the action is criminal[3]; and a usage cannot create or affect legal rights and obligations other than through the binding force of any contract in which it is incorporated[4]. A usage contrary to the provisions of an Act of Parliament will not be recognised as valid[5]. A usage contrary to common law cannot change the law[6], though in the case of the law merchant, in the strict sense of that term, usages have occasionally been incorporated into the common law[7].

1 The word 'universal' has been added to this quotation (see the text concluding at note 2 infra) from the judgment of Cockburn CJ in *Goodwin v Robarts* (1875) LR 10 Exch 337 at 357, Ex Ch; affd (1876) 1 App Cas 476, HL. A merely local usage cannot become part of the common law

2 *Partridge v Bank of England* (1846) 9 QB 396 at 425 per Tindal CJ (local trade usage cannot change the law); *Susé v Pompe* (1860) 8 CBNS 538 at 567 per Byles J (a usage against the settled law merchant held to be invalid); *Meyer v Dresser* (1864) 16 CBNS 646 at 660 per Erle CJ ('A universal usage which is not according to law cannot be set up to control the law'); *Goodwin v Robarts* (1875) LR 10 Exch 337 at 357, Ex Ch, per Cockburn CJ; affd (1876) 1 App Cas 476, HL; *Neilson v James* (1882) 9 QBD 546 at 551, CA, per Lord Coleridge CJ, at 552 per Brett LJ, and at 554 per Cotton LJ; *Daun v City of London Brewery Co* (1869) LR 8 Eq 155 at 161; *Dashwood v Magniac* [1891] 3 Ch 306 at 372, CA, per Kay LJ; and see *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658 at 674-675; *EE and Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302, [1939] 2 All ER 251; and PARA 651 ante. For usages having legal effect independently of contract through incorporation into the common law as part of the 'law merchant' see PARAS 651 note 5 ante, 663-664, 685 post.

3 *Waters v Braithwaite* (1913) 110 LT 266 (where exposing cows for sale overstocked with milk was held to be cruelty within the Protection of Animals Act 1911, although it was in accordance with an old-established farming usage in the neighbourhood of Banbury). Note also *R v Major* (1792) 4 Term Rep 750 (in a prosecution for an offence against weights and measures legislation, no account taken of a local usage to give a different measure).

4 See PARA 651 ante.

5 *Ex p Aynsworth* (1799) 4 Ves 678 (alleged usage to take more interest than the usury laws allowed); *Andrews v Marris* (1841) 1 QB 3 (practice of local court, contrary to the terms of the Act which established it, affords no defence to the court officer in false imprisonment); *Neilson v James* (1882) 9 QBD 546, CA; *Wright v Marquis of Zetland* [1908] 1 KB 63, CA (jury found there was a universal custom that schoolmasters were entitled to a term's notice of dismissal; held, this could not prevail against the terms of the Endowed Schools Act 1869 (now repealed)). Cf *Re Walkers, Winser & Hamm and Shaw, Son & Co* [1904] 2 KB 152 (usage contrary

to Sale of Goods Act 1893 s 15 (now repealed and replaced)); *Cointat v Myham & Son* (1914) 84 LJKB 2253 (usage to sell meat without any warranty as to quality such as that implied by the Sale of Goods Act 1893 s 14 (now repealed and replaced)); these were held to be valid usages, because s 55 (repealed: see now the Sale of Goods Act 1979 s 55 (as amended)) provided that the implications of law could be excluded by usage. Usage may, however, be resorted to for the purpose of interpreting an old and ambiguous Act of Parliament: see PARA 650 notes 7, 12 ante.

6 *Meyer v Dresser* (1864) 16 CBNS 646 at 660 per Erle CJ, at 667 per Byles J ('Can custom change the law? I need say no more than this, that, if this is to be considered as a general law for all mankind in all places, it is an attempt to prove the law by a usage, which cannot be done'), and at 668 per Keating J.

7 See PARAS 663-664, 685 post.

UPDATE

659-662 Reasonableness ... Nature of the law merchant

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/ (3) THE LAW MERCHANT/662. Nature of the law merchant.

(3) THE LAW MERCHANT

662. Nature of the law merchant.

The law merchant is held to be part of the law of England[1]. This proposition has led to considerable confusion, because a number of different meanings have been attached to the expression 'law merchant' (or lex mercatoria)[2]: (1) an independent system of legal doctrine applying to merchants, akin in status to civil or canon law, and perhaps derived from Roman law[3]; (2) a part of the jus gentium, and as such akin to international law[4]; (3) a species of immemorial custom noticed by the courts without proof[5]; (4) current mercantile practice, or the changeable usage of merchants everywhere[6]; (5) that part of the common law which concerns mercantile affairs[7]. Only the last of these can be relevant for the purpose of ascertaining English law. The first two notions are really fictions, or figures of speech. There was no written or ascertainable body of settled substantive law applicable to all merchants universally[8], and little use has been made in English decisions of writers on the jus gentium. The other two cannot be regarded as sources of common law[9]. It saves confusion if, for practical purposes, the law merchant is not treated as somehow extrinsic to, or different in nature from, the common law.

There were at one time numerous local courts in England used chiefly by merchants, such as courts of piepowders[10], and the 'law merchant' as used in those courts denoted an expeditious form of procedure, with process from hour to hour, rather than a corpus of international jurisprudence[11]. Judgments of courts of piepowders could be reviewed on a writ of error to the King's Bench; but such proceedings contributed little or nothing to the development of the law merchant as a branch of the law.

The principle that the law merchant is part of the law of England was most often asserted in distinguishing between local and universal usages. A local mercantile usage or custom cannot be part of the common law, and must therefore be proved by evidence[12]. On the other hand, a usage or custom obtaining among merchants throughout the realm, or beyond, either has no legal force independently of contract[13] or it must be part of the common law; and, if it is part of

the common law, it does not need to be pleaded or proved[14]. When pleaders in the seventeenth century sought to frame actions on bills of exchange, they used to plead the attributes of negotiability as local customs, because not all those attributes were then certainly recognised by the common law. However, when the common law accepted the negotiability of bills, there was no need to plead or prove such a custom, although pleaders sometimes unnecessarily alleged a custom of England[15]; and it was in this context stated that the custom of merchants was part of the law of England. It must remain the case that the usage of a particular trade cannot be part of the law merchant[16].

1 Co Litt 182a; *Carter v Downish* (1689) 1 Show 127; *Hussey v Jacob* (1696) 1 Ld Raym 87 at 88 per Holt CJ ('this custom is properly the common law'); *Gibson v Carruthers* (1841) 8 M & W 321 at 339 per Lord Abinger CB; *Burnett v Brandao* (1843) 6 Man & G 630 at 665 per Lord Denman CJ; affd (reversing the judgment in Ex Ch) sub nom *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 805, HL; *Goodwin v Robarts* (1875) LR 10 Ex Ch 337 at 346, Ex Ch. The Sale of Goods Act 1979 s 62(2) provides that 'The rules of the common law, including the law merchant' apply to contracts for the sale of goods, except in so far as they are inconsistent with the provisions of the Act: see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 9.

2 See 38 CLJ 295. The principal study of the 'incorporation' of the law merchant into the common law is now JS Rogers *The Early History of Bills and Notes* (Cambridge 1995).

3 See 2 Columbia Law Rev 470; Scrutton *The Influence of Roman Law on the Law of England* p 177; Carter, 17 LQR 232 at 240; Mitchell *An Essay on the Early History of the Law Merchant* p 160; Allen *Law in the Making* (7th Edn) p 274.

4 See *The Carrier's Case* (1473) YB Pas 13 Edw 4, f 9, pl 5 (60 Selden Soc 32) per Stillington LC (law merchant is the same as lex naturae, which is a universal law throughout the world); *R v Cusacke* (1619) 2 Rolle Rep 113 per Davies sjt arguendo ('the law merchant is the law of nations, and the mercatura or fellowship of merchants in every realm is a great commonwealth (magna republica), as Ulpian says, for of this commonwealth all nations participate'); *Carter v Downish* (1689) 1 Show 127 at 128 per Shower arguendo ('it is jus gentium and concerns all countries where traffick is used'); *Mogadara v Holt* (1691) 1 Show 317 at 318 per Eyre J ('it is no more than the law of merchants, and that is jus gentium, and we are to take notice of it'); *Luke v Lyde (or Lloyd)* (1759) 2 Burr 882 at 887 per Lord Mansfield CJ ('the maritime law is not the law of a particular country, but the general law of all nations'); *De la Chaumette v Bank of England* (1831) 2 B & Ad 385 at 389 per Lord Tenterden CJ ('the custom of merchants, which was part of the common law introduced into this country, in consequence of the practice in other countries'); and see *Gibson v Carruthers* (1841) 8 M & W 321 at 339 per Lord Abinger CB (on the prevalence of stoppage in transitu in various parts of Europe).

5 1 Bl Com 75; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 386 (distinguishing between the ancient law merchant and recent usages), revsd on this point by *Goodwin v Robarts* (1875) LR 10 Ex Ch 337, Ex Ch (affd (1876) 1 App Cas 476, HL).

6 Malynes, Lex Mercatoria; *Goodwin v Robarts* (1875) LR 10 Ex Ch 337 at 346, Ex Ch (affd (1876) 1 App Cas 476, HL).

7 Eg Lord Wright's introduction to PW Thayer *Cases and Materials in the Law Merchant* (Cambridge, Mass 1939), which equates the law merchant with commercial law generally. Cf Christian's note to 1 Bl Com 75 ('The lex mercatoria, or the custom of merchants, like the lex et consuetudo parliamenti, describes only a great division of the law of England. The laws relating to bills of exchange, insurances, and all mercantile contracts, are as much the general law of England, as the laws relating to marriage or murder. But the expression has frequently led merchants to suppose, that all their new fashions and devices immediately become the law of the land: a notion which perhaps, has been too much encouraged by the courts. Merchants ought to take their law from the courts, and not the courts from merchants.').

8 The only medieval English treatise on the lex mercatoria (circa 1280) says there were but three differences between the law merchant and the common law, namely the speed of process, the liability of pledges to answer, and the prohibition on wager of law as a means of establishing a negative: 1 Little Red Book of Bristol, ed FB Bickley, 57-58. By the 'common law' here is meant the practice of the central courts, which nevertheless took notice of the principles mentioned: *Gren v Berewyk* (1311) YB Hil 4 Edw 2 (26 Selden Soc) 127; *Bandon's Case* (1313) 27 Selden Soc 48, 46 Selden Soc xxv, lxxxi; YB Mich 7 Edw 2 (39 Selden Soc) 14; *Aubrey v Flory* (1321) 86 Selden Soc 235, 243. And see Fortescue *De Laudibus Legum Anglie* ed SB Chrimes at 74.

9 A local custom has the force of law, but only within a defined locality: see PARA 601 et seq ante. Varying usages may affect the content and interpretation of contracts (see PARA 650 et seq ante) but may not have the force of law independently of contract (see PARA 651 ante).

10 A court of piepowders was incident to every fair (preamble to 1 Ric 3 c 6) and to every market (Keil 98, pl 5), with unlimited jurisdiction in personal actions over matters arising within the precinct. The name is said to be an allusion to the dusty feet (pieds poudrés) of the merchants in attendance. For precedents of proceedings in such courts see Hall *Select Cases on the Law Merchant* Selden Soc vols 23, 46. All such courts were abolished in 1977, having been long dormant: see the Administration of Justice Act 1977 s 23, Sch 4; and PARA 699 post.

Mercantile jurisdiction was also exercised by city and borough courts, including the staple courts which sat in certain cities and boroughs, and by the Court of Admiralty. A stronger case can be made for admiralty law being derived in part from the jus gentium; but the law of the sea is not generally reckoned as part of the law merchant. See SHIPPING AND MARITIME LAW vol 93 (2008) PARA 2 et seq.

11 By the sixteenth century, subject to local usage, they followed the common law, and could eg entertain actions of assumpsit: *Webbe v Croft* (1520) KB 27/1037, m 76 (Hereford market); *Pynder v Hall* (1556) KB 27/1178, m 183; Dyer 133a (Sturbridge fair, Cambridge). Even wager of law had crept in (cf note 8 supra): Spelman's Reading on Quo Warranto (Gray's Inn, 1519), 113 Selden Soc 110, 136.

12 See *Anon* (1668) Hard 485 per Hale CB ('although we must take notice in general of the law of merchants, yet all their customs we cannot know but by information'); *Lethulier's Case* (1692) 2 Salk 443 per Holt CJ ('We take notice of the laws of merchants that are general, not of those that are particular usages'); *Hodges v Steward* (1695) 3 Salk 68 at 69 ('though the court takes notice of the law merchant as part of the law of England, yet they cannot take notice of the customs of particular places'); *Bellasis v Hester* (1697) 1 Ld Raym 280 at 281 per Powell J (who said that 'the Court would take notice of the lex mercatoria ... but that such special customs as this here ought to be pleaded'); *Edie v East India Co* (1761) 2 Burr 1216 at 1225 per Foster J ('People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs (which are part of the common law,) and local customs (which are not so)').

13 A mode of carrying on business which is generally found to be convenient is not the same as a practice creating rights, and cannot therefore take effect as part of the law merchant: *Meyer v Dresser* (1864) 16 CBNS 646 at 662-663 per Willes J. A universal usage may nevertheless affect the content and meaning of individual contracts: see PARA 652 ante.

14 *R v Richards* (1542) Dyer 54, Bro Abr, Customes, pl 59, Bro NC 56; *Vanheath v Turner* (1621) Win 24 per Hobart CJ; *Woodward v Rowe* (1666) 2 Keb 105, 132.

15 Hale on Admiralty Jurisdiction, 108 Selden Soc 55; *Carter v Downish* (1689) 1 Show 127, Ex Ch; *Williams v Williams* (1693) Carth 269; *Soper v Dible* (1697) 1 Ld Raym 175; *Buller v Crips* (1703) 6 Mod Rep 29; *Ereskine v Murray* (1728) 2 Ld Raym 1542, Ex Ch. The law of bills and notes is now codified in the Bills of Exchange Act 1882: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1400 et seq. For the proposition that a 'custom of the realm of England' can mean nothing other than common law see PARAS 602, 616 ante.

16 *Lloyds Bank Ltd v Swiss Bankverein* (1913) 108 LT 143 at 145, CA, per Farwell LJ.

UPDATE

659-662 Reasonableness ... Nature of the law merchant

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/ (3) THE LAW MERCHANT/663. Law merchant distinguished from fluctuating usage.

663. Law merchant distinguished from fluctuating usage.

In principle, shifting mercantile usages ought not to be automatically recognised as rules of law, independently of contract, because if the courts so recognise them they must be judicially noticed in subsequent cases and merchants will become bound by the precedents[1]. Usages might therefore become rigidified in their infancy, and retain their binding force while the usages of commerce in fact continue to evolve. There is no good reason why usages which one

generation was free to invent and adapt should become binding on future generations merely because they happen to have been the subject of litigation, especially when the usages have in fact changed[2].

Nevertheless, the courts have sometimes recognised and developed rules of mercantile law by the expedient of taking evidence from merchants, or receiving special verdicts found by juries of merchants, or even consulting with merchants as amici curiae[3], as to the usages which currently prevailed[4]. Lord Mansfield CJ was particularly noted for this approach, and considered that the certainty which it produced in mercantile affairs was more desirable than justice in individual cases[5]. The only way of reconciling this practice to fundamental principle is to suppose that the courts exercise a judicial scrutiny, and apply legal reasoning, in deciding whether and to what extent to receive such usages, when proved as fact, into the law. That was indeed Lord Mansfield's own policy[6].

Usages which merely explain or augment the terms of a written contract are not treated as law in this way[7], but rather as facts bearing upon the ascertainment of the terms of agreements which particular parties have made. Nor can the usages of a particular trade, or of a particular place, be regarded as common law, for want of universality. The incorporation of a usage into the common law only arises in relation to universal usages which purport to have some legal effect beyond that which contracting parties could achieve by agreement, and in particular to usages which allow the assignment of choses in action, or confer some or all of the attributes of negotiability on certain classes of instrument[8].

1 For judicial notice of the law merchant see PARA 685 post. Once a general usage has been settled in the courts, so as to become common law, a new usage cannot be set up against it: *Edie v East India Co* (1761) 2 Burr 1216 at 1222, 1224 per Lord Mansfield CJ, and at 1226 per Foster J ('The custom of merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury, after it has been already settled by judicial determinations'); 2 Starkie on Evidence (1834 Edn) 257-258 ('It is a mistake to suppose that the law in recognising the lex mercatoria adopts it, subject to all the new fashions of merchants ... but it may be laid down as a general proposition, that where a mercantile rule has become part of the general law, no evidence of usage can be received to contradict or alter it, any more than such evidence would be admissible to impugn any other rule of common law'); *Susé v Pompe* (1860) 8 CBNS 538 at 567 per Byles J; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 386 ('Nor, if the ancient law merchant annexes the incident, can any modern usage take it away'); followed on this point (though not on others) by *Goodwin v Robarts* (1875) LR 10 Exch 337 at 357, Ex Ch; affd (1876) 1 App Cas 476, HL.

2 In *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 53, [1968] 1 All ER 585 (affd [1968] 2 QB 545, [1968] 2 All ER 886, CA), Donaldson J held that a usage which had been judicially noticed by Blackburn J in 1873 no longer existed. Although Donaldson J referred at 61 and at 590 to this usage as part of the law merchant ('the law merchant is far from immutable, and it is, I think, open to any court to find on the basis of evidence that it has changed or, if a change has previously been judicially ascertained and established in other proceedings, to take judicial notice of that change'), it was not a rule of the law merchant in the proper sense of a rule of common law, since it only concerned the implied authority of an agent. On appeal Diplock LJ at 558 and at 892 referred to it as a commercial usage.

3 This seems to have been a general practice in the seventeenth and eighteenth centuries: eg *Vanheath v Turner* (1621) Win 24 ('if any doubt arise to [the judges] about their custom, they may send for the merchants to know their custom, as they may send for the civilians'); *Pickering v Barkley* (1649) 2 Rolle Abr 248, pl 10 (merchants 'heard in court' upon a demurrer, as to the interpretation of a charterparty); Hale on Admiralty Jurisdiction, 108 Selden Soc 57 ('the court use to ascertain themselves by speech with merchants'); *Stone v Rawlinson* (1745) Willes 559 at 561 per Willes CJ; *Kruger v Wilcox* (1755) Amb 252 at 253 (four merchant witnesses brought back to the court and questioned as amici curiae); *Edie v East India Co* (1761) 2 Burr 1216 at 1228 per Wilmot J ('if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon'); *Vallejo v Wheeler* (1774) 1 Cowp 143 at 154 per Lord Mansfield CJ (informal consultation). This practice has long been obsolete. For an early but unusual precedent of summoning merchants formally for this purpose by venire facias mercatores see *Dederit v Abbot of Ramsey* (1315) 46 Selden Soc 86, 108 Selden Soc 56.

4 See *Naylor v Mangles* (1794) 1 Esp 109 (wharfingers' lien proved so often that it would be noticed); *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 805, HL, per Lord Campbell ('When a general usage has been judicially ascertained and established, it becomes a part of the law-merchant, which courts of justice are bound to know and recognise'); and PARA 685 post (as to judicial notice of the law merchant). In *Brandao v Barnett* supra at 796, Kelly S-G arguendo remarked that a number of principles of mercantile law, such as stoppage in

transitu, were of very recent origin, and yet no judge would require them to be pleaded or proved. (As to stoppage in transitu see note 8 infra.) And cf *Stone v Rawlinson* (1745) Willes 559 at 561 per Willes CJ ('courts of law have always in mercantile affairs endeavoured to adapt the rules of law to the course and method of trade in order to promote trade and commerce instead of doing it hurt').

5 *Hankey v Jones* (1778) 2 Cowp 745 at 750 ('I desired a case to be made for the opinion of the court, for the sake of that, which perhaps is more important than doing right: to bring all questions upon mercantile transactions to a certainty'). See also the comments on Lord Mansfield's technique by Buller J in *Lickbarrow v Mason* (1787) 2 Term Rep 63 at 73.

6 See *Edie v East India Co* (1761) 2 Burr 1216 at 1222, 1224; *Pillans v Van Mierop* (1765) 3 Burr 1663 at 1669 ('The law of merchants, and the law of the land, is the same: a witness can not be admitted, to prove the law of merchants'). Lord Mansfield used the procedure of a special case, whereby the point was stated for the court in banc to decide as a question of law. Cf *Hawkins v Cardy* (1698) 1 Ld Raym 360 (custom of merchants, though admitted in pleading, held not to be law); *Barnett v Brandao* (1843) 6 Man & G 630 at 665 per Lord Denman CJ (who said that the law adopts 'those customs which ... have been found by experience to be of public use').

7 Liens, however, are sometimes treated as part of the law merchant, and therefore of the common law, if they are of universal application in a particular trade. If they are not thus recognised at common law, they can nevertheless be established by local usage proved as a fact. For this distinction see *Re Catford, Carr v Ford* (1894) 71 LT 584.

8 See PARA 664 post. Generally speaking, the role of the law merchant in its proper sense seems to have been confined to the assignment of choses in action and negotiability: see CHOSES IN ACTION vol 13 (2009) PARA 17.

Bills of lading have special attributes under the law merchant, connected with the passing of property, though they are not negotiable instruments in the strict legal sense: *Lickbarrow v Mason* (1794) 5 Term Rep 683 (where the custom of merchants was set out in a special verdict); *Sanders v Vanzeller* (1843) 4 QB 260 at 297, Ex Ch; *Thompson v Dominy* (1845) 14 M & W 403; *Sewell v Burdick* (1884) 10 App Cas 74, HL; and see CARRIAGE AND CARRIERS. The categories of instrument possessing similar qualities as documents of title may be capable of extension by usage: see, eg, *Zwinger v Samuda* (1816) Holt NP 395 (dock warrants); *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC (mates' receipts; though this was apparently a local usage, and Lord Devlin seems to have confused local trade usage, as incorporated into contracts, with the law merchant and with local custom in the strict sense, and to have attributed to the first the authority of the others); cf *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491, CA (usage rejected as repugnant to the nature of the document).

The right of stoppage in transitu is also said to be founded on the law merchant rather than on contract: *Kendall v Marshall Stevens & Co* (1883) 11 QBD 356 at 364, 368; cf *Snee v Prescot* (1743) 1 Atk 245, where Lord Hardwicke LC resolved a conflict of expert evidence on the subject.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/ (3) THE LAW MERCHANT/664. Law merchant and negotiable instruments.

664. Law merchant and negotiable instruments.

The older view was that, since no amount of modern usage could change the law, an instrument could not acquire the attributes of negotiability merely because merchants treated instruments of that class as if they had them[1]. On this ground, the courts declined to recognise promissory notes as negotiable instruments, and the reform had to be effected by legislation[2].

Nevertheless, by way of apparent exception to the general principle that usage cannot change the law, the courts began in the nineteenth century to recognise new kinds of negotiable instrument, leaving it to juries to decide whether particular categories of instrument were in fact treated as negotiable[3]. One explanation for this exception is that this was permitted by an Act of 1704 which overturned the decision of the judges as to promissory notes[4]. But it may be better to say that the common law, having recognised the concept of a negotiable instrument, cannot confine negotiability to documents in previously settled forms; and so, legislation apart, it is a question of fact what instruments are treated as negotiable at any particular time. Although the principles of law do not alter, the applications may change as practices change[5]. In this respect the law merchant is no different from other branches of the common law. It can

develop systematically from case to case, by analogy, taking account of changes in mercantile usage; but the essential principles cannot fluctuate according to the practices of the moment[6].

1 Christian's note to 1 Bl Com 75, quoted in para 662 note 7 ante; *Grant v Vaughan* (1764) 3 Burr 1516 (negotiability a question of law, not of fact); *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374; *Robinson v Mollett* (1875) LR 7 HL 802 at 826-827 per Cleasby B; and see PARA 651 ante.

2 Clerke v Martin (1702) 2 Ld Raym 757 (where Holt CJ complained at 758 that it was an attempt by Lombard Street to 'give laws to Westminster Hall'); and see the Promissory Notes Act 1704 (repealed). Bills of exchange were an acknowledged exception, because of their antiquity.

3 Glyn v Baker (1811) 13 East 509 (where it is assumed that the negotiability of India bonds could be left to the jury as a question of fact); Wookey v Pole (1820) 4 B & Ald 1 (where the court seems to have taken judicial notice as to the manner of circulation of Exchequer bills); Gorgier v Mieville (1824) 3 B & C 45; Lang v Smyth (1831) 7 Bing 284; A-G v Bouwens (1838) 4 M & W 171, Ex Ch (all cases of foreign bonds); Goodwin v Robarts (1875) LR 10 Exch 337, Ex Ch; affd (1876) 1 App Cas 476, HL.

The reasoning of the Exchequer Chamber in *Goodwin v Robarts* supra was open to a number of objections which were not considered by the House of Lords (see FA Bosanquet, 15 LQR 130, with reply by FB Palmer at 245), in particular the apparent assumption that negotiability can be achieved by contract (see *Goodwin v Robarts* supra at 346), and it was controverted for a time whether the decision had overruled *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374: see *London and County Banking Co v London and River Plate Bank* (1887) 20 QBD 232 at 241 per Manisty J; and note 6 infra. But it seems that it has, so far as negotiable instruments are concerned: *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205; *Rumball v Metropolitan Bank* (1877) 2 QBD 194; *Picker v London and County Banking Co Ltd* (1887) 18 QBD 515 at 517-518, CA, per Lord Esher MR; *London Joint Stock Bank v Simmonds* [1892] AC 201, HL; *Venables v Baring Bros & Co* [1892] 3 Ch 527 at 539 per Kekewich J; *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658 at 674-675 per Kennedy J; *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bigham J; *Webb, Hale & Co v Alexandra Water Co Ltd* (1905) 93 LT 339; cf *Fine Art Society v Union Bank of London* (1886) 17 QBD 705, CA (where there was no evidence of usage). A possible modern example is provided by negotiable certificates of deposit: see *Customs and Excise Comrs v Guy Butler (International) Ltd* [1977] QB 377 at 382, [1976] 2 All ER 700 at 702, CA, per Megaw LJ. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1613.

4 See *De la Chaumette v Bank of England* (1831) 2 B & Ad 385, Ex Ch; and see *Goodwin v Robarts* (1875) LR 10 Exch 337 at 350, Ex Ch (where it is said that the Act was declaratory of the common law). The act referred to is the Promissory Notes Act 1704 (repealed).

5 *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154-155 per Bigham J ('the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code ... our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public; principles do not change, but old rules of applying them change, and new rules may spring into existence').

6 The law as stated in *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 was left undisturbed in this respect by *Goodwin v Robarts* (1875) LR 10 Exch 337, Ex Ch; affd without reference to this point (1876) 1 App Cas 476, HL. The point of departure in *Goodwin v Robarts* supra is that a rule of the law merchant can be derived from modern usage, provided it is settled and universal, and does not have to be coeval with the common law; but once a rule has been received into the law merchant it is law, and cannot be changed by a more recent usage (see LR 10 Exch at 357). The decisions in note 3 supra all represented extensions of a single principle by analogy, not reversals of principle as a result of changes in usage. See also PARA 651 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(4) THE EXTRINSIC EVIDENCE RULE/665. In general.

(4) THE EXTRINSIC EVIDENCE RULE

665. In general.

As a general principle of law, no oral or extrinsic evidence is admissible to alter the terms of a contract which is expressed in writing[1], and parol evidence cannot be admitted to contradict,

vary, or add to the terms of a deed[2]. The instrument must be read as a whole in order to ascertain its true meaning[3] and in general the terms used will be construed in their plain, ordinary, and popular sense[4].

1 *Countess of Rutland's Case* (1604) 5 Co Rep 25b at 26a; *Parteriche v Powlet* (1742) 2 Atk 383 at 384 per Lord Hardwicke LC; *Meres v Ansell* (1771) 3 Wils 275; *Preston v Merceau* (1779) 2 Wm Bla 1249; *Lord Irnham v Child* (1781) 1 Bro CC 92 at 93 per Lord Thurlow LC; *Haynes v Hare* (1791) 1 Hy Bl 659 at 664 per Lord Loughborough CJ; *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64 per Lord Denman CJ; *Bank of Australasia v Palmer* [1897] AC 540 at 545, PC; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 185.

2 *Smith v Doe d Jersey* (1821) 2 Brod & Bing 473 at 541, HL, per Park J. Parol evidence includes evidence in writing which is not contained in a deed.

3 *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 89; *Myers v Sarl* (1860) 3 E & E 306 at 320 per Cockburn CJ; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

4 *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 169.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(4) THE EXTRINSIC EVIDENCE RULE/666. Admission of evidence to annex terms.

666. Admission of evidence to annex terms.

The extrinsic evidence rule[1] is subject to modification as regards usages. It has long been settled that in commercial transactions extrinsic evidence of a usage is admissible to annex incidents to written contracts in matters with respect to which they are silent[2]. The same rule has also been applied to written contracts in other transactions in life where definite usages have been established[3]. The rule is founded on a presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those usages[4], and where the court is considering a contract of that kind, evidence of such usages is receivable[5]. The written contract supplies what is particular to the bargain, and the usage supplies the rest[6]. The effect is precisely as if the terms so annexed had been expressed in writing[7]. It follows that the extrinsic evidence rule prevents the annexation of terms from usage only if the written contract appears to contain the whole agreement, and this will normally be the case only if the effect of usage is expressly excluded.

Examples of usages which have been admitted to add terms to contracts may be found in cases relating to marine insurance[8], charterparties[9], bills of lading[10], sale of goods[11], stock exchange transactions[12], building[13], brokers[14], bankers[15], and actors[16], and also to contracts between landlord and tenant[17]. It may sometimes be possible to incorporate all the terms of a standard form contract, usual in the trade, where the parties have omitted to use writing to record their agreement; but this requires clear evidence that the parties intended to contract in the usual manner[18].

1 See PARA 665 ante.

2 *Yates v Pym* (1816) 6 Taunt 446; *Hutton v Warren* (1836) 1 M & W 466 at 475 per Parke B; *Syers v Jonas* (1848) 2 Exch 111 at 116 per Parke B; *Spartali v Benecke* (1850) 10 CB 212 at 222 per Wilde CJ; *Gulf Line Ltd v Laycock & Co* (1901) 7 Com Cas 1 at 4 per Kennedy J; *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83, CA; cf *Whittaker v Mason* (1835) 2 Bing NC 359 at 370 per Tindal CJ (treated as unsettled).

Some judges were opposed to this development, since it appeared to undermine the purpose of the extrinsic evidence rule, which was to reinforce the certainty of written contracts. They therefore thought that such evidence should be admitted, if at all, only with the utmost caution: *Anderson v Pitcher* (1800) 2 Bos & P 164 at 168 per Lord Eldon CJ; *Greaves v Ashlin* (1813) 3 Camp 426 per Lord Ellenborough CJ; *Johnstone v Usborne* (1840) 11 Ad & El 549 at 557 per Lord Denman CJ; *Trueman v Loder* (1840) 11 Ad & El 589 at 598 per Lord

Denman CJ; cf *Lewis v Marshall* (1844) 7 Man & G 729 at 745 per Tindal CJ (evidence must be 'clear, cogent and irresistible'). However, the only limitation now seems to be that the extrinsic evidence must be consistent with the written contract: see PARA 667 post.

3 Eg local usages: *Wigglesworth v Dallison* (1779) 1 Doug KB 201; *Senior v Armytage* (1816) Holt NP 197; *Smith v Wilson* (1832) 3 B & Ad 728 at 733 per Parke B; *Hutton v Warren* (1836) 1 M & W 466 at 475 per Parke B. Or the usages of a profession: *Grant v Maddox* (1846) 15 M & W 737 (actors); cf *Goblet v Beechey* (1829) 3 Sim 24 (evidence from sculptors required to explain technical terms in the will of Joseph Nollekens).

4 *Hutton v Warren* (1836) 1 M & W 466 at 475 per Parke B; *Gibson v Small* (1853) 4 HL Cas 353 at 397 per Parke B; *Brown v Byrne* (1854) 3 E & B 703 at 715 per Coleridge J.

5 *Brown v Byrne* (1854) 3 E & B 703 at 715 per Coleridge J; see also *Gibson v Small* (1853) 4 HL Cas 353 at 397 per Parke B; *Meyer v Dresser* (1864) 16 CBNS 646 at 660 per Erle CJ. The contract may incorporate rules of a particular association (see PARA 655 text and note 7 ante) and, if so, its effect is governed by ordinary rules of construction; see eg *Woodward v Wolfe* [1936] 3 All ER 529. As regards construing written instruments see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq. See also CONTRACT vol 9(1) (Reissue) PARAS 772-777.

6 *Meyer v Dresser* (1864) 16 CBNS 646.

7 *Raitt v Mitchell* (1815) 4 Camp 146 at 149; *Clark v Smallfield* (1861) 4 LT 405 per Cockburn CJ; *Tucker v Linger* (1883) 8 App Cas 508 at 511, HL, per Lord Blackburn; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314 at 324, HL.

8 *Lethulier's Case* (1692) 2 Salk 443 (where the words 'warranted to depart with convoy' were construed by the usage of merchants to mean that the ship was first to proceed to the rendezvous of the convoy); *Bond v Gonsales* (1704) 2 Salk 445 (on same clause); *Gordon v Morley* (1747) 2 Stra 1265 (on same clause); *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341 (usage that ship's sails, when on shore to be cleaned, were still covered by the policy); *Nable v Kennoway* (1780) 2 Doug KB 510 (usage that goods remaining on board long after arrival were covered by policy); *Rucker v London Assurance Co* (1784) 2 Bos & P 432n; *Brough v Whitmore* (1791) 4 Term Rep 206; *Vallance v Dewar* (1808) 1 Camp 503; *Miller v Tetherington* (1862) 7 H & N 954, Ex Ch (usage that goods jettisoned were not covered by policy). See also INSURANCE.

9 *Bottomley v Forbes* (1838) 5 Bing NC 121 (agreement to pay at so much per ton for goods shipped at Bombay; evidence was allowed of a usage to pay according to measurement taken before the goods were put on board); *Chaurand v Angerstein* (1791) Peake 61 (usage that words 'in the month of October' meant after 25 October); *Cuthbert v Cumming* (1855) 11 Exch 405 (usage of loading sugar in hogsheads); *Pust v Dowie* (1864) 5 B & S 20 at 25; affd (1865) 5 New Rep 338 (usage of the port of loading as to the proportions of weight and measurement tonnage); *Hutchinson v Tatham* (1873) LR 8 CP 482 (usage as to agent's personal liability if principal not disclosed within a reasonable time); *Norden Steamship Co v Dempsey* (1876) 1 CPD 654; *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83, CA. See also CARRIAGE AND CARRIERS.

10 *Haynes v Holliday* (1831) 7 Bing 587 (where a shipmaster agreed to carry 'a boat' of certain dimensions and was allowed to show that by a usage he was entitled to take off its deck while being carried by his ship); *Brown v Byrne* (1854) 3 E & B 703; *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610.

11 *Jones v Bowden* (1813) 4 Taunt 847 (implied warranty annexed to sale, by usage, so as rebut principle of caveat emptor); *Syers v Jonas* (1848) 2 Exch 111 (universal usage in tobacco trade that a sale of goods should be by sample); *Moore v Campbell* (1854) 10 Exch 323; *Lucas v Bristow* (1858) EB & E 907 (agreement to purchase a cargo of 'best oil', 'inferior oil' to be taken at a reduction; evidence of a usage was admitted to show that the contract was only performed if a substantial portion of the whole was 'best oil'); *Johnson v Raylton* (1881) 7 QBD 438, CA (usage that manufacturer must supply goods of his own make); *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152; see also *Re North Western Rubber Co Ltd, and Hüttenbach & Co* [1908] 2 KB 907, CA; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1917] 1 KB 320, CA (usage in oil seed trade that on a resale buyers must accept original shippers' appropriation); and *Ross Bros Ltd v Shaw & Co* [1917] 2 IR 367 (sale of goods 'as required' where vendor not producer: usage that reasonable time be allowed for delivery is admissible as being explanatory). See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 19.

12 *Sutton v Tatham* (1839) 10 Ad & El 27; *Bayliffe v Butterworth* (1847) 1 Exch 425; *Grissell v Bristowe* (1868) LR 4 CP 36, Ex Ch; *Coles v Bristowe* (1868) 4 Ch App 3; *Scott and Horton v Godfrey* [1901] 2 KB 726; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421.

13 *Moon v Witney Union Guardians* (1837) 3 Bing NC 814 (usage for architect to employ quantity surveyors at client's expense); *Myers v Sarl* (1860) 3 E & E 306. See also BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 247.

14 *Dale v Humfrey* (1858) EB & E 1004 (liability of broker for undisclosed principal); *Allan v Sundius* (1862) 1 H & C 123 (shipping brokers' commission); *Fleet v Murton* (1871) LR 7 QB 126 (fruit trade); *Robinson v Mollett* (1875) LR 7 HL 802 (tallow trade); *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 (dry goods trade); *Pike v Ongley* (1887) 18 QBD 708, CA (hop trade); *Caraman, Rowley and May v Aperghis* (1923) 40 TLR 124 (dried fruit trade).

15 *The Maira (No 3)* [1990] 1 AC 637(usage to capitalise interest).

16 *Grant v Maddox* (1846) 15 M & W 737 (where an actress was engaged to perform at a certain salary per week, and evidence was allowed to show that she was only entitled to be paid during the theatrical season). See also LICENSING AND GAMBLING vol 67 (2008) PARA 238.

17 *Wigglesworth v Dallison* (1779) 1 Doug KB 201; *Beaven v Delahay* (1788) 1 Hy Bl 5; *Senior v Armytage* (1816) Holt NP 197; *Holding v Pigott* (1831) 7 Bing 465; *Hutton v Warren* (1836) 1 M & W 466; and see *Clayton v Gregson* (1836) 5 Ad & El 302. As to agricultural and mining leases see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 301 et seq; MINES, MINERALS AND QUARRIES; as to usual covenants see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 83.

18 *British Crane Hire Corpn v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (plant hiring trade). Cf *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep 57 (where there was insufficient evidence to establish a notorious usage). As to standard form contracts see CONTRACT vol 9(1) (Reissue) PARA 771.

UPDATE

666 Admission of evidence to annex terms

NOTE 2--See *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2004] 1 All ER (Comm) 435 (implied term based on usage relating to inspection in sale contract excluded by clause stating contract contained entire agreement of parties and was not affected by any other usage or course or dealing).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(4) THE EXTRINSIC EVIDENCE RULE/667. Repugnancy.

667. Repugnancy.

Although extrinsic evidence is admissible to explain what is doubtful, or to supply omissions, in a written contract, it is not admissible to contradict what is plain[1]. Evidence of a usage which would be repugnant to, or inconsistent with, the written contract is therefore inadmissible[2]. At one time this principle was taken to require the exclusion of evidence which would add a new stipulation to an unequivocal contract[3], but this approach seems now to have been abandoned as too strict[4]. Any material incident added to the express terms of a written contract will vary it to some degree, but this is not in itself an objection to the annexation of a term by reason of usage[5]. A usage will, however, be repugnant if the written contract contains a provision dealing differently with the same subject-matter[6].

An unwritten term or incident which it is sought to establish by usage will be held repugnant, and evidence of the usage will accordingly be excluded, if it would alter the intrinsic nature of the contract as written[7] or would, if included in the written contract, make it insensible or inconsistent[8], or thoroughly unreasonable[9]. Examples of usages rejected on the ground of repugnancy or inconsistency may be found in cases relating to marine insurance[10], charterparties[11], bills of exchange[12], brokers[13], bills of lading[14] and sale of goods[15], and also in the case of contracts between landlord and tenant[16] and contracts containing an arbitration clause[17].

1 *Blackett v Royal Exchange Assurance Co* (1832) 2 Cr & J 244 at 249 per Lord Lyndhurst CB, cited with approval in *Hall v Janson* (1855) 4 E & B 500 at 510 per Lord Campbell CJ; but questioned by Cockburn CJ in *Myers v Sarl* (1860) 3 E & E 306 at 317. See also *Crofts v Marshall* (1836) 7 C & P 597 at 605 per Lord Denman CJ; *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610 at 618 per Keating J.

2 *Brown v Byrne* (1854) 3 E & B 703 at 715 per Coleridge J; *Hall v Jansen* (1855) 4 E & B 500 (policy of insurance); *Hayton v Irwin* (1879) 5 CPD 130, CA (charterparty); *Reynolds & Co v Tomlinson* [1896] 1 QB 586 (charterparty); *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314, HL (sale of goods; jurisdiction of arbitrator to determine existence of custom); *Miller, Gibb & Co v Smith and Tyrer Ltd* [1917] 2 KB 141, CA (agency); *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, CA (sale of goods); *Vickery's Patents Ltd v Hill* (1917) 33 TLR 536 (sale of goods); *Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801 at 809, HL, per Lord Birkenhead LC (charterparty); *Westacott v Hahn* [1918] 1 KB 495, CA (lease); *Palgrave, Brown & Son Ltd v SS Turid* [1922] 1 AC 397, HL (charterparty). See also *Bower v Jones* (1831) 8 Bing 65; *Drummond v A-G for Ireland* (1849) 2 HL Cas 837 at 863; *Cuthbert v Cumming* (1855) 11 Exch 405 at 408 per Coleridge J; *Biggs v Gordon* (1860) 8 CBNS 638; *Fullwood v Akerman* (1862) 11 CBNS 737; *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610 at 618 per Keating J; *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83 at 87, CA, per Lord Esher; *Gulf Line Ltd v Laycock & Co* (1901) 7 Com Cas 1 at 4 per Kennedy J; *Gibbon v Pease* [1905] 1 KB 810, CA; *Wright v Marquis of Zetland* [1908] 1 KB 63, CA.

3 *Gibbon v Young* (1818) 8 Taunt 254; *Reading v Menham* (1832) 1 Mood & R 234; *Whittaker v Mason* (1835) 2 Bing NC 359 at 370 per Tindal CJ (difficulty as to when a 'silence' might be supplied by usage); *Crofts v Marshall* (1836) 7 C & P 597 at 605 per Lord Denman CJ; *Bottomley v Forbes* (1838) 5 Bing NC 121 at 127 per Tindal CJ; *Cockburn v Alexander* (1848) 6 CB 791; *Re Stroud* (1849) 8 CB 502; *Spartali v Benecke* (1850) 10 CB 212; *Phillipps v Briard* (1856) 1 H & N 21 (where a distinction is taken between annexing an 'incident' and adding a new term). The same principle was at work in the doctrine that extrinsic evidence was only admissible in the case of ambiguity: *Studdy v Sanders* (1826) 5 B & C 628 ('cyder' held ambiguous); *Clayton v Gregson* (1836) 5 Ad & El 302 ('level' held ambiguous); *Powell v Horton* (1836) 2 Bing NC 668 (doubtful whether 'mess pork' was ambiguous); *Bowman v Horsey* (1837) 2 Mood & R 85 at 96 per Lord Abinger CB ('on account of B for J' in need of explanation). Cf *Buckle v Knoop* (1867) LR 2 Exch 125 at 129 per Kelly CB (the admission of evidence of usage to explain written contracts 'sometimes has been held to prevail to an extent at first sight almost amounting to a contradiction of the expressions explained').

4 See *Field v Lelean* (1861) 6 H & N 617, Ex Ch, overruling *Spartali v Benecke* (1850) 10 CB 212, to the extent that it forbade the addition of new terms consistent with the written contract.

5 *Brown v Byrne* (1854) 3 E & B 703 at 715 per Coleridge J; and see *Tucker v Linger* (1883) 8 App Cas 508, HL (custom of country for lessee to take flints held not to be inconsistent with reservation of minerals in lease); *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83, CA (a term may be added provided it is not inconsistent with the written contract); *Mowbray, Robinson & Co v Rosser* (1922) 91 LJKB 524 at 527, CA, per Scrutton LJ; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1917] 1 KB 320 at 330, CA, per Scrutton LJ; *De Beéche v South American Stores Ltd, and Chilian Stores Ltd* [1935] AC 148 at 158, HL, per Viscount Sankey LC.

6 *Westacott v Hahn* [1918] 1 KB 495, CA.

7 *Sweeting v Pearce* (1861) 9 CBNS 534, Ex Ch; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491, CA; *Robinson v Mollett* (1875) LR 7 HL 802 at 816 per Mellor J, and at 818 per Brett J; *HG Harper & Co v J Bland & Co Ltd* (1914) 84 LJKB 738. The inconsistency must be shown by reading the contract as a whole: *Myers v Sarl* (1860) 3 E & E 306 at 320 per Cockburn CJ.

8 *Humfrey v Dale* (1857) 7 E & B 266 at 274 per Lord Campbell CJ (cited with approval in *Palgrave, Brown & Son Ltd v SS Turid* [1922] 1 AC 397 at 406, HL, per Viscount Birkenhead LC); and see *Spartali v Benecke* (1850) 10 CB 212 (usage that vendor not bound to deliver goods without payment held bad); *Abbott v Bates* (1875) 45 LJQB 117, CA (usage to charge apprentice for clothing held repugnant to a contract to find him clothes, since this implies that the finding will be gratis); *Robinson v Mollett* (1875) LR 7 HL 802; *Perry v Barnett* (1885) 15 QBD 388 at 393, 397; *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83 at 87, CA, per Lord Esher; *London Export Corpn Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411, [1958] 1 WLR 661, CA (a trade custom or practice which permitted an umpire to attend the deliberations of an appeal board after the conclusion of a hearing was excluded from an arbitration agreement by its express terms and by necessary implication from those terms).

9 *Barrow & Bros v Dyster, Nalder & Co* (1884) 13 QBD 635 (where evidence of a usage was rejected because had the usage been incorporated into the written contract (which contained an arbitration clause) the effect would have been to make the interested parties judges in their own cause); and see note 8 supra. For reasonableness see PARA 659 ante.

10 *Blackett v Royal Exchange Assurance Co* (1832) 2 Cr & J 244 (usage for underwriters not to pay for loss of boats carried on a ship's quarter); *Hall v Janson* (1855) 4 E & B 500; *Dickenson v Jardine* (1868) LR 3 CP 639 (jettisoned goods).

11 *Gibbon v Young* (1818) 8 Taunt 254; *Cockburn v Alexander* (1848) 6 CB 791; *Phillipps v Briard* (1856) 1 H & N 21; *Scrutton v Childs* (1877) 36 LT 212; *Hayton v Irwin* (1879) 5 CPD 130, CA; *The Alhambra* (1881) 6 PD 68, CA; *Lishman v Christie* (1887) 19 QBD 333, CA; *The Nifa* [1892] P 411; *Reynolds & Co v Tomlinson* [1896] 1 QB 586; *Gulf Line Ltd v Laycock & Co* (1901) 7 Com Cas 1; *Metcalfe, Simpson & Co v Thompson, Pattrick and Woodwark* (1902) 18 TLR 706; *Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801, HL; *Palgrave, Brown & Son Ltd v SS Turid* [1922] 1 AC 397, HL.

12 *Susé v Pompe* (1860) 8 CBNS 538 (where a bill of exchange drawn and indorsed in England and payable abroad was dishonoured by the acceptor's non-payment, and the holder was held entitled as against the drawer to recover from the latter the amount of the re-exchange, but evidence of a usage entitling the holder alternatively to recover the sum he gave for the purchase of the bill was rejected, as being evidence of a usage which contradicted the written bill).

13 *Jones v Littledale* (1837) 6 Ad & El 486; *Trueman v Loder* (1840) 11 Ad & El 589 (tallow trade); *Gibson v Crick* (1862) 1 H & C 142 (shipping brokers); *Robinson v Mollett* (1875) LR 7 HL 802 (tallow broker); *Barrow and Bros v Dyster, Nalder & Co* (1884) 13 QBD 635 (liability of broker for undisclosed principal; *Perry v Barnett* (1885) 15 QBD 388 (stockbroker); *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; *North and South Trust Co v Berkeley* [1971] 1 All ER 980, [1971] 1 WLR 470 (insurance brokers' practice in acting as agents both for Lloyd's underwriters and for the insured held invalid).

14 *Fawkes v Lamb* (1862) 31 LJQB 98 (where a written contract was silent as to any allowance of warehouse rent, and evidence was rejected to prove an oral agreement to exclude the usual allowance).

15 *Yates v Pym* (1816) 6 Taunt 446; *Ford v Yates* (1841) 2 Man & G 549; *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, CA; *Vickery's Patents Ltd v Hill* (1917) 33 TLR 536; *Mowbray, Robinson & Co v Rosser* (1922) 91 LJKB 524, CA; *Ross Bros Ltd v Shaw & Co* [1917] 2 IR 367.

16 *Boraston v Green* (1812) 16 East 71; *Webb v Plummer* (1819) 2 B & Ald 746; *Roberts v Barker* (1833) 1 Cr & M 808; *Westacott v Hahn* [1918] 1 KB 495, CA.

17 *London Export Corpn Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411, [1958] 1 WLR 661, CA; and see note 8 supra.

668. Local measures and feast days.

Where weights and measures have been defined by law[1], the legal definitions are understood to be incorporated into contracts in the absence of a clear contrary intention[2]. This is also true of references to times and feast days[3]. However, it is permissible to make contracts with reference to non-standard measures provided this is made clear[4]. Evidence of usage is normally rejected for this purpose, in the absence of an express indication that a special usage is to apply, since it is otherwise taken to contradict the express contract[5]. Where, however, a term is equivocal, evidence of usage is admissible[6]; and this must often be so in the case of contracts with a foreign element[7]. The courts have admitted evidence of English local usage to explain words such as 'acre'[8], 'month'[9], and 'hundred' or 'thousand'[10].

1 See the Weights and Measures Act 1985; and WEIGHTS AND MEASURES. It seems that local usage cannot be set up as a defence to, or to work an extension of, statutory offences concerning weights and measures: *R v Major* (1792) 4 Term Rep 750.

2 *Wing v Earle* (1592) Cro Eliz 212, 267 ('mile' means 1,760 yards); *Noble v Durell* (1789) 3 Term Rep 271 ('pound' means 16 ounces); *Smith v Wilson* (1832) 3 B & Ad 728 at 732 per Lord Tenterden CJ; *O'Donnell v O'Donnell* (1882) LR 13 Ir 226 ('acre' as defined by statute of 1824); *De Beéche v South American Stores Ltd and Chilean Stores Ltd* [1935] AC 148 at 158, HL, per Viscount Sankey LC.

3 Eg a reference to Michaelmas, in a lease, will be taken to mean 29 September: *Doe d Spicer v Lea* (1809) 11 East 312.

4 *Giles v Jones* (1855) 11 Ex Ch 393, Ex Ch (reference to 'long' tons of 2,400 pounds).

5 *Noble v Durell* (1789) 3 Term Rep 271 (evidence rejected of an alleged usage in Southampton that a pound of butter sold in the market should weigh 18 ounces); *Hockin v Cooke* (1791) 4 Term Rep 314; *Doe d Spicer v Lea* (1809) 11 East 312 (bushel taken to mean Winchester bushel of eight gallons, as defined by statute). It has been said that the rule in *Doe d Spicer v Lea* is confined to deeds (*Doe d Hall v Benson* (1821) 4 B & Ald 588); the reason for such a distinction is not apparent, but evidence of usage has sometimes been admitted in cases of parol leases: *Furley d Canterbury Corpn v Wood* (1794) 1 Esp 198 (custom of Kent); *Hogg v Norris* (1860) 2 F & F 246.

6 Eg 'bale' is an uncertain term and has often been explained by trade usage: eg *Benson v Schneider* (1817) 7 Taunt 272; *Taylor v Briggs* (1827) 2 C & P 525; *Gorrissen v Perrin* (1857) 2 CBNS 681; *Australian Agricultural Co v Saunders* (1875) LR 10 CP 668, Ex Ch. See also *Doe d Hall v Benson* (1821) 4 B & Ald 588 ('Lady Day' is equivocal and may be explained by usage).

7 Eg *Bottomley v Forbes* (1838) 5 Bing NC 121 (evidence of usage admitted to explain whether cotton was to be measured at Bombay or London); but cf *Moller v Living* (1811) 4 Taunt 102 ('lasts' taken to mean English rather than Prussian lasts, because the contract made this clear).

8 *Batecoke v Coulyng* (1310) YB Trin 3 Edw 2 (20 Selden Soc) 189 (Cornish acre); *Sir John Bruyn's Case* (circa 1558) cited in 6 Co Rep 67a; *Morgan v Tedcastle* (1594) Poph 55; *Some v Taylor* (1599) Cro Eliz 665; *Barksdale v Morgan* (1693) 4 Mod Rep 185 at 186 (Cornish acre and Staffordshire perch); *Waddy v Newton* (1725) 8 Mod Rep 276. This was despite the so-called 'statute' De terris amensurandis, 33 Edw 1. However, the meaning has been fixed since the Weights and Measures Act 1824 s 2 (repealed), after which local usage is ineffective unless expressly incorporated: *O'Donnell v O'Donnell* (1882) LR 13 Ir 226.

9 *Jolly v Young* (1794) 1 Esp 186; *Simpson v Margitson* (1847) 11 QB 23; *Rogers v Hull Dock Co* (1864) 34 LJCh 165; *Bissell v Beard* (1873) 28 LT 740; *Bruner v Moore* [1904] 1 Ch 305 at 311 per Farwell J. It was a usage in the City of London that, in mercantile contracts only, 'month' meant a calendar month: *Turner v Barlow* (1863) 3 F & F 946. In all contracts, 'month' now means a calendar month unless the context otherwise requires: Law of Property Act 1925 s 61. (The 'context' for this purpose could include a local or trade usage.) See also PARA 670 post; and TIME vol 97 (2010) PARA 310.

10 *Smith v Wilson* (1832) 3 B & Ad 728 ('thousand', when counting rabbits in Suffolk, meant a hundred dozen, ie 1,200); several examples were given in argument (see at 729) of 'hundred' meaning six score. See also *Anon* (1507) Keil 87, pl 3 (in some places a hundred sheep means six score).

UPDATE

668 Local measures and feast days

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(4) THE EXTRINSIC EVIDENCE RULE/669. Admission of evidence to explain terms.

669. Admission of evidence to explain terms.

Evidence of usage may be admitted to explain terms which are prima facie unambiguous[1], and to show that they have a special meaning in the context in which they are used. In commercial cases such evidence supplies, as it were, a mercantile dictionary in which to find the mercantile meaning of the words which are used[2]. Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile usage is admitted in order to expound the language and arrive at its true meaning; and in construing a contract

among merchants, tradesmen or other persons similarly related to each other, such evidence will not be excluded merely because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning may be used by the contracting parties in a different sense[3].

Although it is sometimes said that extrinsic evidence is not admissible to contradict a document by attempting to establish a special meaning for words which bear a plain and ordinary meaning and acceptation[4], it is not obvious why any words should be incapable of bearing a special meaning in a special context[5]. At any rate, if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of life to which the contract relates, it is obvious that due effect would not be given to the intention if the terms were interpreted according to their ordinary and not according to their peculiar signification[6]. Therefore, whenever such a question has come before the courts it has always been held that where the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar meaning generally attached to them in some particular department of life, the parties who have drawn up the contract with reference to that department of life must have intended to use the words in the peculiar sense. This is merely an application of the well-known rule that the interpretation of contracts must be governed by the common intention of the parties; and, from the nature of the case, the peculiar meaning of the terms used can be discovered only by means of extrinsic evidence[7]. The principle is not confined to trade usages[8].

1 *Cochran v Retberg* (1800) 3 Esp 121 ('days' has an ordinary meaning, but may be shown by evidence of usage to mean working days); *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ; *Mallan v May* (1844) 13 M & W 511 at 518 per Pollock CB; *Myers v Sarl* (1860) 3 E & E 306; *Bowes v Shand* (1877) 2 App Cas 455 at 468, HL, per Lord Cairns LC; *Gulf Line Ltd v Laycock & Co* (1901) 7 Com Cas 1 at 4 per Kennedy J. See also *J Lowenstein & Co Ltd v Poplar Motor Transport (Lymm) Ltd* [1968] 2 Lloyd's Rep 233 at 238 per Nield J (a commercial contract must be construed according to the understanding of business people so as to give it business efficacy); and see generally note 7 infra.

2 *Birch v Depeyster* (1816) 1 Stark 210 at 211 per Gibbs CJ; *Bowes v Shand* (1877) 2 App Cas 455, HL; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1917] 1 KB 320 at 330, CA, per Scrutton LJ; but see *Holt & Co v Collyer* (1881) 16 ChD 718 (where evidence of special meaning of 'beerhouse' was rejected).

3 *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ; *Sotilichos v Kemp* (1848) 3 Exch 105 at 106 per Pollock CB; *Brown v Byrne* (1854) 3 E & B 703 at 715 per Coleridge J; *Buckle v Knoop* (1867) LR 2 Exch 125 at 129 per Kelly CB; *Bowes v Shand* (1877) 2 App Cas 455 at 462, HL, per Lord Cairns LC; *Robey v Arnold* (1897) 14 TLR 39; on appeal (1898) 14 TLR 220, CA; *Re North Western Rubber Co Ltd, and Hüttenbach & Co* [1908] 2 KB 907 at 923, CA, per Buckley LJ; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314 at 324, 326, HL, per Lord Atkinson; and see the Uniform Laws on International Sales Act 1967 s 1(1), Sch 1, art 9(3), Sch 2, art 13(2). As to that Act see generally para 650 note 4 ante.

4 Eg 2 Starkie on Evidence (1834 Edn) 566 ('merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar usage ... but they ought not to be permitted to alter and corrupt the sterling language of the realm'); *Charlton v Gibson* (1844) 1 Car & Kir 541 (evidence as to the meaning of 'building' excluded); *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610 at 616 per Williams J (evidence of a usage as to the meaning of a written contract should be excluded if 'any Englishman would have read it without encountering any difficulty in its construction'). Cf *Bank of New Zealand v Simpson* [1900] AC 182 at 189, PC ('if the words in question have a fixed meaning not susceptible of explanation, parol evidence is not admissible to shew that the parties meant something different from what they have said'); this was not a case concerning usage.

5 See 3 Corbin on Contracts, ch 24. It may be more difficult to establish a special (eg ungrammatical) meaning for a group of words, which have an accepted grammatical structure, than it is for individual terms of art, where the question is purely one of vocabulary. On the other hand, a grammatically meaningless phrase may have a mercantile meaning: *Ashforth v Redford* (1873) LR 9 CP 20 at 21 per Keating J.

There must also be some reluctance to accept a special meaning which is the complete reverse of the ordinary meaning: eg *Caine v Horsfall* (1847) 2 Car & Kir 349 ('net' cannot be shown to mean 'gross'); *Palgrave, Brown & Son Ltd v SS Turid* [1922] 1 AC 397, HL ('alongside' cannot mean ten feet or more away); followed in *Rederi Aktiebolaget Acolus v WN Hillas & Co Ltd* (1926) 96 LJKB 186, HL; *Mowbray, Robinson & Co v Rosser* (1922) 91 LJKB 524, CA ('shipment' cannot mean loading onto a railway vehicle). However, 'white' has been shown by evidence of trade usage to include black: *Mitchell v Henry* (1880) 15 ChD 181, CA.

The concept of an ordinary meaning is not itself free from doubt, since there is room for difference as to what it is: see, eg, *A-G v Cast-Plate Glass Co* (1792) 1 Anst 39 (ordinary meaning of 'square' held to mean rectangle rather than four-sided equilateral); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL (where there was a judicial difference of opinion as to the ordinary meaning of 'condition').

6 *Myers v Sarl* (1860) 3 E & E 306 at 315 per Cockburn CJ.

7 *Myers v Sarl* (1860) 3 E & E 306 at 315 per Cockburn CJ, at 318 per Hill J, and at 319 per Blackburn J; *Hart v Standard Marine Insurance Co Ltd* (1889) 22 QBD 499, CA; and see *Lewis v Marshall* (1844) 7 Man & G 729, where the jury were directed that words should be understood in their plain and ordinary meaning (see at 743), but the court in banc accepted that the ordinary meaning could be displaced by clear, cogent and irresistible evidence (see at 745). Cf *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 at 89, CA, where Cozens-Hardy MR said evidence of usage as to the meaning of words was inadmissible if the words had no special or secondary meaning; if this were correct, most of the decisions on this subject would be wrong, since the special meaning can only be shown by evidence.

It has been held that, in relation to commercial contracts, certain recent decisions have wrought a fundamental change in the principles of construction and that almost all the old intellectual baggage of 'legal' interpretation has been discarded: see *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkins & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114-115, HL, per Lord Hoffmann; and see further CONTRACT vol 9(1) (Reissue) PARA 777.

8 See *Smith v Wilson* (1832) 3 B & Ad 728 (local usage as to meaning of 'thousand' when counting rabbits); *Shore v Wilson* (1842) 9 Cl & Fin 355 at 555, HL, per Parke B (referring to local usage or usage amongst particular classes); *Grant v Maddox* (1846) 15 M & W 737 (usage concerning payment of actors); and see further DEEDS AND OTHER INSTRUMENTS.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(4) THE EXTRINSIC EVIDENCE RULE/670. Words used with peculiar meaning.

670. Words used with peculiar meaning.

Where it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business, or in the place, to which the contract relates, that meaning is prima facie to be attributed to it, unless upon construction of the whole contract enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail[1]. Thus, evidence of a usage has been admitted to show that the word 'thousand' as applied to rabbits in a lease of a warren in Suffolk meant 1,200[2]; to show the local meaning of 'acre' or 'perch'[3]; to show the meaning of the word 'weeks' as used in a contract for the engagement of an actress[4]; of the word 'months' in a charterparty[5]; of the words 'laid up' in a charterparty[6]; of the words 'next two months' in the iron trade[7]; of the word 'days' in a bill of lading[8]; of the word 'shipment' in a contract for sale of timber in the American timber trade[9]; the meaning of and the distinction between the words 'good' and 'fine' in the barley trade[10]; the meaning of the words 'running days'[11] and 'weather working days'[12] in charterparties; of the expression 'Demerara sugar' in a contract in the provision trade[13]; what latitude is given by the word 'about'[14]; the meaning of the word 'level' as understood by miners in the district[15]; that the term 'particular average' did not include expenses incurred in saving insured property[16]; what the word 'wet' meant as applied to oil[17]; that 'pimento' did not mean sea-damaged pimento[18]; the meaning of the word 'statuary' in the carrying trade[19]; that 'cyder' meant the juice of apples pressed from the fruit and not the finished beverage of that name[20]; to explain the expression 'to load in regular turn'[21]; to show the meaning of the words 'in turn to deliver'[22] and 'about' a certain quantity of barrels[23] as used in certain charterparties; that the word 'furniture' in a policy of marine insurance included provisions carried for the use of the crew[24]; to explain the expression 'weekly account' used in a building agreement under seal, as understood in the building trade[25]; to construe the words 'be in any way concerned or interested in the erection or use of any similar works'[26]; to show that 'stock' meant sound sheep[27]; to show that 'net proceeds' meant proceeds exclusive of bad debts[28]; to show that 'current rate of exchange for

approved commercial bills on London' in a charterparty meant 90 day bills and not sight bills[29]; to show that 'as required' in a contract for sale and delivery of goods where the vendor was not the producer meant within a reasonable time sufficient to enable the vendor to obtain the goods[30]; and to show that 'first class bill on London' meant in Chile a bill drawn by one of certain bankers in Chile on one of certain bankers in London[31].

On the same principle, evidence is admissible of local or trade usage to explain geographical proper names[32].

1 *Myers v Sarl* (1860) 3 E & E 306 at 319-320 per Blackburn J; and see *Rushforth v Hadfield* (1806) 7 East 224 at 228 per Lord Ellenborough CJ; *Peter Darlington Partners Ltd v Gosho* [1964] 1 Lloyd's Rep 149; *Phillips and Stratton v Dorintal Insurance Ltd* [1987] 1 Lloyd's Rep 482 at 487 per Steyn J. If the special usage is not made out, the court will give the words their ordinary meaning: *Wilkins v Wood* (1848) 17 LJQB 319; *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 at 88, CA; *Biddlecombe v Bond* (1835) 4 Ad & El 332; *Parker v Gossage* (1835) 2 Cr M & R 617; *Elliott v Turner* (1845) 2 CB 446 at 461, Ex Ch

2 *Smith v Wilson* (1832) 3 B & Ad 728.

3 *Barksdale v Morgan* (1693) 4 Mod Rep 185 at 186 (Cornish acre and Staffordshire perch). Superficial measures have had statutory definitions since 1824: see PARA 668 ante.

4 *Grant v Maddox* (1846) 15 M & W 737; *Myers v Sarl* (1860) 3 E & E 306; see also *Kelly v London Pavilion Ltd* (1898) 14 TLR 234, CA (where the words 'engagement' and 'perform' as used in a theatrical contract are considered); and *Blow v Lewis* (1902) 19 TLR 127; *Hardie v Balmain* (1902) 18 TLR 539, CA (both cases on the construction of theatrical contracts).

5 *Jolly v Young* (1794) 1 Esp 186; see *Simpson v Margitson* (1847) 11 QB 23; *Bissell v Beard* (1873) 28 LT 740. See also PARA 668 note 9 ante.

6 *North Shipping Co Ltd v Union Marine Insurance Co Ltd* (1919) 35 TLR 292, CA.

7 *Bissell v Beard* (1873) 28 LT 740.

8 *Cochran v Retberg* (1800) 3 Esp 121.

9 *Mowbray, Robinson & Co v Rosser* (1922) 91 LJKB 524, CA.

10 *Hutchison v Bowker* (1839) 5 M & W 535.

11 *Nielsen v Wait* (1885) 16 QBD 67, CA.

12 *Alvion Steamship Corpn of Panama v Galban Lobo Trading Co SA of Havana* [1955] 1 QB 430, [1955] 1 All ER 457, CA.

13 *Anderson v Britcher* (1913) 110 LT 335.

14 *Alcock v Leeuw & Co* (1883) Cab & El 98.

15 *Clayton v Gregson* (1836) 5 Ad & El 302 (a case of a lease).

16 *Kidston v Empire Marine Insurance Co* (1867) LR 2 CP 357, Ex Ch.

17 *Warde v Stuart* (1856) 1 CBNS 88.

18 *Jones v Bowden* (1813) 4 Taunt 847.

19 *Sutton & Co v Ciceri & Co* (1890) 15 App Cas 144, HL.

20 *Studdy v Sanders* (1826) 5 B & C 628.

21 *Hudson v Clementson* (1856) 18 CB 213.

22 *Robertson v Jackson* (1845) 2 CB 412.

23 *Alcock v Leeuw & Co* (1883) Cab & El 98; see also *Moore v Campbell* (1854) 10 Exch 323 (usage of hemp brokers).

24 *Brough v Whitmore* (1791) 4 Term Rep 206.

25 *Myers v Sarl* (1860) 3 E & E 306.

26 *Southland Frozen Meat and Produce Export Co Ltd v Nelson Bros Ltd* [1898] AC 442, PC.

27 *Jones v Bowden* (1813) 4 Taunt 847 at 853 per Heath J.

28 *Caine v Horsfall* (1847) 1 Exch 519.

29 *Gripaios v Kahl Wallis & Co Ltd* (1928) 45 TLR 161.

30 *Ross Bros Ltd v Shaw & Co* [1917] 2 IR 367.

31 *De Beéche v South American Stores Ltd and Chilian Stores Ltd* [1935] AC 148, HL.

32 *Uhde v Walters* (1811) 3 Camp 16 (Gulf of Finland treated as part of the Baltic); *Moxon v Atkins* (1812) 3 Camp 200 (meaning of Amelia Island); *Robertson v Clarke* (1824) 1 Bing 445 (whether Mauritius is considered as being in the East Indies); *Norden Steamship Co v Dempsey* (1876) 1 CPD 654 (meaning of Liverpool as a port of arrival); *Birrell v Dryer* (1884) 9 App Cas 345, HL (meaning of Gulf of St Lawrence in a policy of insurance). Cf *Mallan v May* (1844) 13 M & W 511 ('London' held to mean City of London, in the absence of evidence showing usage in a broader sense). As to the interpretation of commercial contracts see generally para 669 note 7 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(5) PERSONS BOUND BY USAGE/671. In general.

(5) PERSONS BOUND BY USAGE

671. In general.

As a general rule a person who is ignorant of the existence of a usage is not bound by it[1]. In some circumstances, however, a person may be presumed, notwithstanding an allegation of his ignorance, to have known of the usage when he entered into the contract[2]. This is particularly so where a person undertakes to perform a duty with reference to a particular trade; he is then necessarily obliged, in order to perform that duty with a reasonable degree of care and skill, to acquaint himself by due inquiry with the usages of that trade[3]. Persons following a particular occupation may sometimes need to be aware of the usages of another; for instance, marine insurers need to know something of the usages of merchants and mariners[4].

1 *Gabay v Lloyd* (1825) 3 B & C 793; *Bartlett v Pentland* (1830) 10 B & C 760 at 770 per Lord Tenterden CJ; *Scott v Irving* (1830) 1 B & Ad 605 at 612 per Lord Tenterden CJ; *Partridge v Bank of England* (1846) 9 QB 396 at 425 per Tindal CJ; *Kirchner v Venus* (1859) 12 Moo PCC 361 at 399, PC; *Hathesing v Laing* (1873) LR 17 Eq 92 (where a shipowner was held not bound by the local usage of merchants in Bombay); *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901. See also *Matveieff & Co v Crossfield* (1903) 8 Com Cas 120. In *Sweeting v Pearce* (1861) 9 CBNS 534 at 536, Ex Ch, it was held that, even if a usage was generally known in the trade, it would not affect a contract if the jury found that the party was in fact unaware of it; but the case concerned a usage which without express consent would have been unreasonable. If a usage is unreasonable, it cannot bind without actual knowledge and acceptance: see PARAS 659 text and note 5 ante, 674 text and note 4 post.

2 *Noble v Kennoway* (1780) 2 Doug KB 510 (quoted in note 4 infra); and see *Rushforth v Hadfield* (1806) 7 East 224 at 228 per Lord Ellenborough CJ and at 230 per Grose J; *Sewell v Corp* (1824) 1 C & P 392 at 393 per Best CJ; *Holderness v Collinson* (1827) 7 B & C 212 at 216 per Bayley J; *Bartlett v Pentland* (1830) 10 B & C 760 at 770 per Lord Tenterden CJ; *Sutton v Tatham* (1839) 10 Ad & El 27 at 30 per Littledale J; *Pollock v Stables* (1848) 12 QB 765 at 775 per Lord Denman CJ; *Harrison v Ames* (1850) 15 LTOS 321; *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610; *Buckle v Knoop* (1867) LR 2 Exch 125 at 129 per Kelly CB; affd LR 2 Exch 333; *Mollett v Robinson* (1872) LR 7 CP 84 at 111, Ex Ch, per Blackburn J; revsd sub nom *Robinson v Mollett* (1875) LR 7 HL 802 (see PARA 674 text and note 3 post); *Newall v Royal Exchange Shipping Co* (1885) 33

WR 868, CA (where the usage was not made out); and see also *Re Florence, ex p Wingfield* (1879) 10 ChD 591 at 593-594, CA, per Jessel MR; *Reynolds v Smith* (1893) 9 TLR 494, HL.

The rule only applies if the custom is held to be reasonable. A person ignorant of a usage cannot be bound by it if it appears unreasonable: see PARA 659 ante.

3 See *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610 at 617 per Willes J.

4 *Salvador v Hopkins* (1765) 3 Burr 1707 (usage of East India Company trade); *Noble v Kennoway* (1780) 2 Doug KB 510 per Lord Mansfield CJ ('Every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it he ought to inform himself'); *Kingston v Knibbs* (1808) 1 Camp 508n (usage as to manner of unloading); *Da Costa v Edmunds* (1815) 4 Camp 142 (usage as to manner of stowing cargo); *British and Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41, HL (usage of carriers); but cf *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498 at 512, HL, per Lord O'Hagan (the principle only applies to a usage directly affecting the commercial venture and not something collateral). However, a bank is under no duty to know the trade usages of its customers: *Rayner v Hambro's Bank* [1943] KB 37.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(5) PERSONS BOUND BY USAGE/672. Notoriety.

672. Notoriety.

The question whether knowledge of a usage is to be imputed to a person depends upon the degree of notoriety which that usage has acquired. If a usage, whether it is a commercial usage or one of a particular trade or of persons bound by particular contractual obligations in respect of land, has become so general and notorious within its particular sphere that all persons dealing within its sphere can easily ascertain it, then those persons are presumed to have been aware of it when they entered into the contract, and will be deemed to have submitted to be bound by it, even though they allege that they were ignorant of its existence[1].

1 See *Rushforth v Hadfield* (1806) 7 East 224 at 228 per Lord Ellenborough CJ, and at 230 per Grose J; *Todd v Reed* (1821) 3 Stark 16; *Sewell v Corp* (1824) 1 C & P 392; *Gabay v Lloyd* (1825) 3 B & C 793; *Holderness v Collinson* (1827) 7 B & C 212 at 216; *Bleaden v Hancock* (1829) 4 C & P 152; *Rainy v Vernon* (1840) 9 C & P 559; *Pollock v Stables* (1848) 12 QB 765; *Buckle v Knoop* (1867) LR 2 Exch 125 at 129 per Kelly CB; affd LR 2 Exch 333; *Foxall v International Land Credit Co* (1867) 16 LT 637; *Grissell v Bristowe* (1868) LR 3 CP 112 at 128 per Bovill CJ; revsd on the facts of the case LR 4 CP 36. See also *Mollett v Robinson* (1872) LR 7 CP 84 at 111, Ex Ch, per Blackburn J; revsd sub nom *Robinson v Mollett* (1875) LR 7 HL 802 (see PARA 674 text and note 3 post); *Nelson v Dahl* (1879) 12 ChD 568 at 575, CA, per Jessel MR; *Young v WM Smith & Son* (1948) 81 Ll L Rep 274 at 276; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421; and see PARA 671 note 2 ante. This is another way of saying that a practice which is not sufficiently notorious is not a usage at all. For the meaning of notoriety in this connection see PARA 657 ante.

UPDATE

672 Notoriety

NOTE 1--See *Turner v Royal Bank of Scotland plc* (1999) Times, 17 April, CA (general practice between banks to disclose confidential customer details to each other in response to status inquiries held not to amount to 'usage', as practice was not disclosed to customers).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(5) PERSONS BOUND BY USAGE/673. Particular markets etc.

673. Particular markets etc.

A person who deals in a market is bound to inquire what its usages are, and those who deal with him have a right to hold him bound by them to the same extent as a person would have been bound who belonged to the place[1]. Such a person in these circumstances is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to have known, and must be taken to deal according to the usage of the market[2].

A person who directs another to make a contract at a particular place must be taken as having intended that the contract should be made in accordance with the usage of that place[3].

1 See *Mollett v Robinson* (1872) LR 7 CP 84 at 111, Ex Ch, per Blackburn J; revsd sub nom *Robinson v Mollett* (1875) LR 7 HL 802 (see PARA 674 text and note 3 post). See also *Bayliffe v Butterworth* (1847) 1 Exch 425 at 429 per Alderson B; *Pollock v Stables* (1848) 12 QB 765.

2 *Bayliffe v Butterworth* (1847) 1 Ex Ch 425 at 429 per Alderson B. See also *Pollock v Stables* (1848) 12 QB 765; *Bayley v Wilkins* (1849) 7 CB 886 at 902 per Coltman J; *Duncan v Hill* (1871) LR 6 Exch 255 at 266-267 per Kelly CB; revsd on the facts (1873) LR 8 Exch 242.

3 *Bayliffe v Butterworth* (1847) 1 Exch 425 at 429 per Alderson B; see also *Harker v Edwards* (1887) 57 LJQB 147, CA.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(5) PERSONS BOUND BY USAGE/674. Employment of broker.

674. Employment of broker.

A person who employs a broker must be supposed to give the latter authority to act as other brokers do; it does not matter whether the employer was or was not himself acquainted with the rules by which brokers are bound[1]. Thus a person employing on the Stock Exchange a broker who is notoriously a broker must be taken to have authorised the latter to act in obedience to the rules of the Stock Exchange[2].

If, however, a principal employs a broker to transact business for him upon a market of whose usages the principal is ignorant, he gives authority to the broker to make contracts upon the footing of such usages only in so far as they merely regulate the mode of performing the contracts and do not change their intrinsic character[3]. The principal cannot be bound by a usage which the courts consider to be unreasonable[4].

1 *Sutton v Tatham* (1839) 10 Ad & El 27 at 30 per Littledale J; *Bayliffe v Butterworth* (1847) 1 Exch 425; *Pollock v Stables* (1848) 12 QB 765; *Harker v Edwards* (1887) 57 LJQB 147, CA; and see further AGENCY.

2 *Sutton v Tatham* (1839) 10 Ad & El 27 at 29 per Lord Denman J; *Harker v Edwards* (1887) 57 LJQB 147, CA; *Forget v Baxter* [1900] AC 467 at 479, PC; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421.

3 See *Robinson v Mollett* (1875) LR 7 HL 802 at 836 per Lord Chelmsford. In that case it was doubted whether the usage in question applied at all except to dealings by brokers between themselves, and even if the usage had a wider application, the usage was held to be of such a peculiar character that no person who was ignorant of it could be held to have agreed to it.

4 *Todd v Reid* (1821) 4 B & Ald 210; *Pierson v Scott* (1878) 47 LJCh 705; *Perry v Barnett* (1885) 15 QBD 388, CA; *Harker v Edwards* (1887) 57 LJQB 147, CA; *Smith v Reynolds* (1891) 8 TLR 137; affd (1892) 8 TLR 391, CA; affd sub nom *Reynolds v Smith* (1893) 9 TLR 494, HL; *Blackburn v Mason* (1893) 68 LT 510 at 511, CA.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(5) PERSONS BOUND BY USAGE/675. Particular professions etc.

675. Particular professions etc.

If there is a general usage applicable to any particular profession, parties employing an individual engaged in that profession are supposed to deal with him according to that usage[1].

On the other hand, if the usage is in some respect lacking in notoriety persons ignorant of it are not bound by it[2]. Thus a usage of a particular place or of a particular class of persons cannot bind other persons unless they are acquainted with the usage and adopt it[3]; if the usage is confined to a particular category of persons engaged in a trade, other persons in that trade are not bound by it[4]. It has been held on this ground that a usage obtaining among insurance brokers at Lloyd's is not binding on their principals in the absence of actual knowledge, because it is the usage of a particular house and not of the insurance market in general[5].

1 See *Sewell v Corp* (1824) 1 C & P 392 at 393 per Best CJ (an alleged usage of veterinary surgeons).

2 *Gabay v Lloyd* (1825) 3 B & C 793 (usage regarding insurance policies effected at Lloyd's Coffee-house not binding in the case of a policy effected there by an underwriter not in the habit of subscribing policies there).

3 *Bartlett v Pentland* (1830) 10 B & C 760 at 770 per Lord Tenterden CJ.

4 *Gabay v Lloyd* (1825) 3 B & C 793 at 797.

5 *Gabay v Lloyd* (1825) 3 B & C 793; *Bartlett v Pentland* (1830) 10 B & C 760; *Matvieff & Co v Crosfield* (1903) 19 TLR 182; *Acme Wood Flooring Co Ltd v Marten* (1904) 90 LT 313; *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901; but see *North and South Trust Co v Berkeley* [1971] 1 All ER 980 at 990, [1971] 1 WLR 470 at 482 per Donaldson J (point left open). Cf *Stewart v Aberdein* (1838) 4 M & W 211 (evidence of usage at Lloyd's and also at Liverpool held sufficient to bind brokers). See further INSURANCE.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(5) PERSONS BOUND BY USAGE/676. One-sided usages.

676. One-sided usages.

When a considerable number of men of business carry on one side of a particular business they are apt to set up a usage which acts very much in favour of their side of the business, and provided they do not infringe some fundamental principle of right and wrong, they may establish such a usage; but if on dispute before a legal forum it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the court has always determined that such a usage, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void[1]. A usage, to be effective, must bind both parties to the contract[2].

1 *Robinson v Mollett* (1875) LR 7 HL 802 at 818 per Brett J; and see *Marsh v Jelf* (1862) 3 F & F 234 (not permissible for auctioneers to agree among themselves a custom to bind their clients); *North and South Trust Co v Berkeley* [1971] 1 All ER 980, [1971] 1 WLR 470; *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, [1969] 2 All ER 421; and PARA 659 note 8 ante.

2 See the relevant provisions of the Sale of Goods Act 1979 and of the Marine Insurance Act 1906; and PARA 653 note 1 ante; and of the Uniform Laws on International Sales Act 1967 (see PARAS 650 text and note 4, 653 text and note 5 ante).

UPDATE

676 One-sided usages

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/677. Necessity for proof.

(6) PROOF OF USAGE

677. Necessity for proof.

Whether a usage exists is a question of fact[1], and it is necessary to prove the usage in each case, until such time as the courts take judicial notice of it[2]. Every usage of which the courts do not take judicial notice must be clearly shown to exist[3].

1 Since it is a question of fact, it may be admitted in pleading or at the trial: see, eg, *Read v Dunsmore* (1840) 9 C & P 588; *London Joint Stock Bank Co v Simmons* [1892] AC 201 at 207, HL, per Lord Halsbury LC; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421.

When juries were used in commercial cases, the existence and content of a usage was a question for the jury, not for the judge: *Kirby v Williamson* (1852) 19 LTOS 203; *Lucas v Bristow* (1858) E B & E 907; *Catterall v Hindle* (1867) LR 2 CP 368, Ex Ch; *Dent v Nickalls* (1873) 29 LT 536, affd (1874) 30 LT 644, Ex Ch. Juries were sometimes directed to take account of their own knowledge of usages, without evidence: *Charleton v Cotesworth* (1825) Ry & M 175; *Schweitzer v Long* (1863) 3 F & F 687, and the cases cited in the note there; *Ashforth v Redford* (1873) LR 9 CP 20; *Sparkes v North Coast Steam Navigation Co* (1899) 20 LR (NSW) 371 at 374; cf *Lucas v Bristow* supra, where it is said that the jurors in such cases must base their verdict upon evidence rather than their own knowledge.

2 *Moult v Halliday* [1898] 1 QB 125 at 129 per Channell J; *Goodwin v Robarts* (1875) LR 10 Exch 337; affd (1876) 1 App Cas 476, HL; *Nelson v Dahl* (1879) 12 ChD 568 at 575, CA, per Jessel MR; see also *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 616, HL, per Lord Blackburn; *George v Davies* [1911] 2 KB 445 at 447 per Bray J; and see PARAS 683-686 post.

3 *Moult v Halliday* [1898] 1 QB 125 at 130 per Channell J; see also *Coles v Bristowe* (1868) 4 Ch App 3 at 11 per Lord Cairns LC. See PARAS 683-684 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/678. Method of proof.

678. Method of proof.

A usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation, trade, or position[1]. A witness should have direct experience of the occupation or trade in question; and so it is not proper to call a lawyer whose experience of the trade was gained indirectly from his legal practice[2]. The evidence must be clear and convincing; and it must also be consistent[3].

In order to prove a particular trade usage alleged to exist at a particular place, the evidence of persons carrying on the same trade in another place may be called to show that the particular

trade usage exists at that other place, provided the two places are in the same vicinity and there is shown to be an interchange of the trade between them[4].

1 See, eg, *Cohen v Paget* (1814) 4 Camp 96 (ship-brokers called to prove a usage regarding the commission of a broker); *Murray v Currie* (1836) 7 C & P 584 (land agents called to prove a usage as to the allowance of commission to the agent first finding the purchaser); *Stewart v Aberdein* (1838) 4 M & W 211 (evidence of insurance brokers accepted as to a usage between brokers and underwriters); *Re Matthews, ex p Powell* (1875) 1 ChD 501, CA (affidavits of three furniture dealers admitted to prove a usage of hiring furniture to hotel keepers); see also *Eicke v Meyer* (1813) 3 Camp 412; *Rainy v Vernon* (1840) 9 C & P 559; *Plaice v Allcock* (1866) 4 F & F 1074; *Bottomley v Forbes* (1838) 5 Bing NC 121. A single witness may be sufficient: *Goodey and Southwold Trawlers Ltd v Garriock, Mason and Millgate* [1972] 2 Lloyd's Rep 369 at 373.

2 *Davis v Temco* [1992] CLY 2064.

3 *Bowes v Shand* (1877) 2 App Cas 455, HL; *Levitt v Hamblet* [1901] 2 KB 53 at 66, CA, per Collins LJ; *Re Hill* (1875) 1 ChD 503 at 503n per Mellish LJ; and see *Lewis v Marshall* (1844) 7 Man & G 729 at 745 per Tindal CJ (evidence must be 'clear, cogent and irresistible'); *Carter v Crick* (1859) 4 H & N 412 per Pollock CB (evidence must be 'clear, distinct and irresistible'); *Willans v Ayers* (1877) 3 App Cas 133 at 146, PC (a considerable discrepancy in the evidence as to the nature of the alleged usage led the court to the conclusion that the usage was not universally admitted by those conversant with the particular trade); *Blandy Bros & Co Lda v Nello Simoni Ltd* [1963] 2 Lloyd's Rep 24; affd [1963] 2 Lloyd's Rep 393, CA (conflicting affidavits insufficient to prove usage). As to universality see PARAS 652 text and note 12 ante, 679 post.

4 *Noble v Kennoway* (1780) 2 Doug KB 510 (evidence of usage extended from Newfoundland to Labrador); *Falkner v Earle* (1863) 32 LJQB 124 (evidence of usage in Texas may support similar usage in California); *Plaice v Allcock* (1866) 4 F & F 1074 (usage in Loughborough adduced to support similar usage in Nottingham region).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/679. Universal acquiescence.

679. Universal acquiescence.

In order to prove a usage in a particular trade it must be shown that the usage is certain and reasonable and so universally acquiesced in that everybody engaged in the trade knows of it, or might know if he took the pains to inquire[1]. It is not sufficient to show that it is observed by many members of a particular trade, because it must be universal[2]. Evidence tending to show that the alleged usage is in a high degree unreasonable will also be of weight in considering whether or not the alleged usage does, in fact, exist[3].

In areas of business where there is a model form of contract, or codified rules of usage, which are optional so that they only apply when expressly adopted into contracts[4], and there is evidence that they are sometimes so adopted, it may be more difficult to establish a binding usage[5].

1 *Wood v Wood* (1823) 1 C & P 59 per Burrough J; *Plaice v Allcock* (1866) 4 F & F 1074; *Newall v Royal Exchange Shipping Co* (1885) 33 WR 868, CA; *Bettany v Eastern Morning and Hull News Co Ltd* (1900) 16 TLR 401; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134, HL; *Lord Forres v Scottish Flax Co Ltd* [1943] 2 All ER 366, CA.

2 See PARAS 652 text and note 12, 678 note 2 ante.

3 *Bottomley v Forbes* (1838) 5 Bing NC 121 at 138 per Tindal CJ. As to reasonableness see PARAS 659-660 ante.

4 See PARA 687 post.

5 It could perhaps be shown in a particular context that there is a universal usage understood and accepted by those who choose not to follow the model form.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/680. Opinion distinguished from de facto observance.

680. Opinion distinguished from de facto observance.

The evidence of witnesses, in order to prove the existence of a usage, must amount to something more than mere opinion[1]; it must establish the fact of observance of the usage, by providing instances[2] of the usage having been acted upon; otherwise the testimony will be of little weight[3]. In order to establish a mercantile usage it is necessary to show not only that a large number of influential people at the place where it is alleged to exist have agreed that it would be a good thing to have such a usage, but also that the agreement has, in fact, been acted upon; because unless it is acted on, no one is likely to challenge it[4]. The clearest way of establishing a usage as binding in fact is to show that it has been unsuccessfully challenged or resisted in the past[5], though this is not an indispensable requirement[6].

1 *Roe d Henderson v Charnock* (1790) Peake 5 per Lord Kenyon CJ; *Savill v Barchard* (1801) 4 Esp 53 at 54 per Lord Kenyon CJ; *Cunningham v Fonblanque* (1833) 6 C & P 44; *Hall v Benson* (1836) 7 C & P 711 at 714 per Tindal CJ; *Tucker v Linger* (1882) 21 ChD 18 at 34, CA, per Jessel MR, and at 38 per Cotton LJ (dissenting); affd (1883) 8 App Cas 508, HL; *Knight v Cotesworth* (1883) Cab & El 48; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 572, [1967] 1 WLR 1421 at 1438 per Ungoed-Thomas J; *Bank of India v Patel* [1982] 1 Lloyd's Rep 506 at 516 per Bingham J; *Vitol SA v Philbro Energo AG* [1990] 2 Lloyd's Rep 84 at 90. Opinion evidence was sometimes taken in the seventeenth and eighteenth centuries: eg *Camden v Cowley* (1763) 1 Wm Bl 417 per Lord Mansfield CJ; and see PARA 663 ante.

2 A single instance will not usually suffice for this purpose: *General Reinsurance Corpn v Forsakringaktienbolaget Fennia Patria* [1983] QB 856 at 873, [1983] 2 Lloyd's Rep 287 at 294-295, CA, per Kerr LJ.

3 *Lewis v Marshall* (1844) 7 Man & G 729 at 743.

4 *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292 at 295 per Kennedy J.

5 *Bettany v Eastern Morning and Hull News Co* (1900) 16 TLR 401; *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 at 8 per Bailhache J; *Stag Line v Board of Trade* (1950) 83 Ll L Rep 356 at 360 per Devlin J; *FE Hookway & Co Ltd v Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep 491 at 510 per Devlin J.

6 *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 573, [1967] 1 WLR 1421 at 1439 per Ungoed-Thomas J (pointing out that a usage could never become recognised if this were required).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/681. Disproof.

681. Disproof.

Where it is sought to establish the existence of a usage, the other party may adduce evidence tending to prove the non-existence of the usage by producing witnesses who from their profession, trade, or position would be bound to have heard of the usage if it in fact existed, and who state that they have never heard of it[1]; or they may adduce evidence to show that in the particular transaction the parties did not act upon the usage[2]; or to show that, although there may have been such usage as is alleged, another inconsistent usage has sprung up[3]; or to show that the usage alleged to have grown up was only followed by some members of the profession or trade under protest[4]. The non-existence of a usage cannot, however, be proved by merely calling the party interested in denying its existence to say that he never heard of its existence[5].

If it can be shown that express contracts or arrangements are commonly made to the same effect as an alleged usage, in contexts in which the usage is supposed to operate, that is strong evidence that the usage does not exist[6].

1 *Bourne v Gatliffe* (1841) 3 Man & G 643 at 684 per Alderson B; on appeal (1844) 7 Man & G 850, HL; *Levitt v Hamblet* [1901] 2 KB 53 at 66, CA; *Bank of India v Patel* [1982] 1 Lloyd's Rep 506 at 516 per Bingham J; *Vitol SA v Philbro Energo AG* [1990] 2 Lloyd's Rep 84 at 91; and see Sir Patrick Devlin in 14 MLR at 251; but cf *The Rehearo* [1933] P 286 at 296 per Langdon J (evidence of usage not negatived by one old man not knowing of it).

2 *Bourne v Gatliffe* (1841) 3 Man & G 643 at 684 per Alderson B.

3 *Moult v Halliday* [1898] 1 QB 125 at 130 per Channell J. See also PARA 655 ante.

4 *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134, HL.

5 *Re Witt, ex p Shubrook* (1876) 2 ChD 489 at 492, CA, per Mellish LJ. As to the nature of evidence necessary to prove want of knowledge of the existence of an alleged usage see *Matveieff & Co v Crossfield* (1903) 8 Com Cas 120 at 123 per Kennedy J.

6 *Gulf Line v Laycock* (1901) 7 Com Cas 1 at 6; *Re North-West Rubber Co and Huttenbach* [1908] 2 KB 907 at 919, CA, per Fletcher-Moulton LJ; *Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801 at 807-808, HL; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 572, [1967] 1 WLR 1421 at 1437 per Ungoed-Thomas J ('Arrangements or compromises to the same effect as the alleged usage do not establish usage; they contradict it. They may be the precursors of usage; but usage presupposes that arrangements and compromises are no longer required'); *General Reinsurance Corpn v Forsakringaktienbolaget Fennia Patria* [1983] QB 856 at 873, [1983] 2 Lloyd's Rep 287 at 294-295 , CA, per Kerr LJ.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/682. Subsequent proof.

682. Subsequent proof.

Where the evidence tendered in support of a usage is not sufficient to establish it, the dismissal of the action upon the ground of the failure of proof of the usage does not necessarily disprove its existence or prejudice the person seeking to establish it, so as to prevent him from establishing the existence and validity of the usage in any subsequent action in respect of a similar transaction[1].

1 *Beckhuson and Gibbs v Hamblet* [1901] 2 KB 73 at 74, CA.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/683. Judicial notice of usages.

683. Judicial notice of usages.

A commercial or other usage may be so often proved in courts of law that the courts will take judicial notice of it[1]. This is done in order to avoid putting the parties to the unnecessary expense of having to prove, by a large number of witnesses, a usage which has been proved over and over again[2]. As regards the necessity of proof, usages pass through certain stages. There is the primary stage when the particular usage must be proved with certainty and precision; there is the secondary stage when the court has become to some degree familiar with the usage, and when slight evidence only is required to establish it[3]; and there is the final

stage when the court takes judicial notice of the usage, and evidence is not required[4]. The courts will also sometimes take notice of everyday usages from their own knowledge of life[5].

1 *Re Matthews, ex p Powell* (1875) 1 ChD 501 at 506, CA, per Mellish LJ (a case of reputed ownership rather than of contract); *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 805; *Levitt v Hamblet* [1901] 2 KB 53; *Edelstein v Schuler & Co* [1902] 2 KB 144 at 155-156 per Bigham J; *George v Davies* [1911] 2 KB 445 at 447 per Bray J; *Re Torrens, ex p John Marston's Carriage Works Ltd* [1924] 2 IR 1 at 9 per Andrews LJ.

2 *Re Matthews, ex p Powell* (1875) 1 ChD 501 at 506, CA, per Mellish LJ.

3 Cf *Cory Brothers Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58 at 63 (usage established partly by reference to reported cases and partly by confirmatory evidence). However, in *Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801, HL, a single previous decision, supported by slight oral evidence in the instant case, was considered insufficient to establish a usage; see Lord Birkenhead LC at 807 ('I demur to the practice of finding facts upon evidence given in other cases, between other parties').

4 *Moult v Halliday* [1898] 1 QB 125 at 129-130 per Channell J; and see *George v Davies* [1911] 2 KB 445 (judicial notice taken by county court judge as a result of his judicial experience rather than of reported cases); *The State (Taylor) v Circuit Court Judge for Wicklow* [1951] IR 311 at 321. It seems, however, that in every case where it is intended to rely upon a usage, the party relying upon its existence should be prepared with evidence to establish it, although the particular usage appears to have been judicially noticed in reported cases. Reported cases alone should not be relied upon, owing to the transitory nature of usages; for a usage formerly notorious may give place to another and become the exception rather than the rule: see *Ropner & Co v Stoate, Hosegood & Co* (1905) 92 LT 328 at 332 per Channell J; *Moult v Halliday* [1898] 1 QB 125; *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA, and see PARA 655 ante.

5 Eg *A-G v* Wright [1897] 2 QB 318, CA (general usages of navigation with respect to anchorage); *Mount v Oldham Corpn* [1973] QB 309 at 315, [1973] 1 All ER 26 at 28, CA (where Lord Denning MR took notice that it was the normal usage to require a term's notice, or fees in lieu thereof, when removing a pupil from a school); *American Airlines Inc v Hope* [1973] 1 Lloyd's Rep 233 at 245, CA (where Roskill LJ took notice of the meaning of the abbreviation 'tba L/U'); *Re Charge Card Services Ltd* [1987] Ch 150 at 158, [1986] 3 All ER 289 at 304 per Millett J; affd [1989] Ch 497, [1988] 3 All ER 702, CA (general understanding of the public as to credit cards); and see *Sparkes v North Coast Steam Navigation Co* (1899) 20 LR (NSW) 371 at 374 (the jury may take notice, without evidence, of general usage for friends to be allowed on board a ship to say goodbye to passengers). Cf, in the context of reputed ownership, *Bartram v Payne* (1827) 3 C & P 175 at 177 per Gaselee J (referring to the practice of coachmakers leaving finished coaches in their front shops for display purposes); *Hamilton v Bell* (1854) 10 Exch 545 at 550 per Pollock CB (referring to notorious usages that manufacturers sometimes hired rather than owned the machinery in their factories, that gentlemen sometimes did not own the coaches with their own arms on them, and that clockmakers sometimes displayed in their windows clocks which had been brought for repair).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/684. Degree of proof required for notice.

684. Degree of proof required for notice.

The courts have not laid down any guiding rule as regards the exact number of times a usage must be proved before judicial notice of it will be taken[1]. It would seem that the mere proof and establishment of a valid usage once only does not of itself entitle a person in a subsequent action to dispense with proof of the usage[2]; but, on the other hand, where there are several cases in which the usage has been established, this fact of itself will cause the court to take judicial notice of the usage[3]. The cases must not be contradictory, but must appear to the court to be sufficient to establish that the alleged usage has been frequently proved[4].

1 It is the duty of judges to take judicial notice of all general customs, rules and principles which have been held to have the force of law in any division of the High Court or by any of the superior courts of law or equity and all customs which have been duly certified to and recorded in any such court: Stephen, Digest of the Law of Evidence (12th Edn) art 61(4). This cannot, however, extend to trade usages, since these do not have the force

of law. In *Lohre v Aitchison* (1878) 3 QBD 558 at 562, CA, Brett LJ referred to usages which had been 'proved before the courts so clearly and so often as to have been long recognised by the courts without further proof'.

2 This is because the evidence might not have been challenged or seriously contested in the previous case. For the possibility that a usage might be admitted in litigation see PARA 677 note 1 ante.

3 *Re Parker, ex p Turquand* (1885) 14 QBD 636 at 645, CA.

4 *Re Matthews, ex p Powell* (1875) 1 ChD 501 at 507, CA.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/685. Law merchant.

685. Law merchant.

The courts will take judicial notice of those usages which have been judicially ascertained and established as part of the law merchant[1]. These usages are the general law of the land and have been incorporated into the common law; and for this reason they ought not to be treated as resting on evidence of fact after they have been judicially noticed[2]. It follows that it is not permissible to adduce evidence that a usage which has once become part of the law merchant has in fact changed[3].

1 Hale on Admiralty Jurisdiction, 108 Selden Soc 54-55; *Peirson v Pounteys* (1608) Yelv 135 at 136 per Yelverton, arguendo; *Carter v Dowrish* (1689) Carth 83; *Mogadara v Holt* (1691) 1 Show 317 at 318 per Eyre J; *Lethulier's Case* (1692) 2 Salk 443 per Holt CJ; *Bellasis v Hester* (1697) 1 Ld Raym 280 at 281 per Powell J; *Ereskine v Murray* (1728) 2 Ld Raym 1542, Ex Ch; *Edie v East India Co* (1761) 2 Burr 1216 at 1226 per Foster J; *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 805, HL, per Lord Campbell, and at 810 per Lord Lyndhurst. As to the law merchant see PARAS 662-664 ante.

2 *Edie v East India Co* (1761) 2 Burr 1216 at 1225 per Denison J. In *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934 at 944-945, Vaughan Williams LJ said that judicial notice will not be taken of rules of the law merchant unless they have been established by evidence in an earlier case: but by 'law merchant' here he seems to have been referring to trade usages which control the meaning of contracts.

3 *Edie v East India Co* (1761) 2 Burr 1216 at 1222, 1224 per Lord Mansfield CJ, and at 1226 per Foster J; *Susé v Pompe* (1860) 8 CBNS 538 at 567 per Byles J; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 386; followed on this point (though not on others) by *Goodwin v Robarts* (1875) LR 10 Exch 337 at 357, Ex Ch; affd (1876) 1 App Cas 476, HL; and see PARA 663 ante. Cf *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 866, CA, explained at para 663 note 2 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(6) PROOF OF USAGE/686. Examples of usages judicially noticed.

686. Examples of usages judicially noticed.

Judicial notice has been taken[1] of the usage of drivers of vehicles upon public roads to keep to the left[2]; of persons riding on horseback to keep to the same side[3]; of the general practice of conveyancers[4]; of the usage by which insurers deduct one-third from the expenses of repairing a ship, unless the ship is a new ship, because the repairs will generally make the ship a better and more valuable vessel than she was before damage[5]; of the usage of bankers to have a general lien[6]; of the usage amongst shipowners and underwriters that a declaration may be altered even after the loss is known[7]; of a usage of packers to have a general lien over the goods of a customer[8]; of the usage of underwriters as to the rules of average adjustment[9]; of the usage of innkeepers to have a general lien over the chattels of guests deposited with the

innkeeper[10]; of the usage that debentures to bearer are negotiable, although not so expressed upon their face[11]; of the usage of hotel and boarding house keepers to hold their furniture on hire[12]; and of a usage for booksellers to have in their shops books which they do not own to be sold on commission[13].

1 Some of the cases cited in this paragraph were decided in the context of the doctrine of reputed ownership, which, for the purposes of the law of bankruptcy, was abolished by the Insolvency Act 1985 (now largely repealed and replaced by the Insolvency Act 1986): see PARA 657 note 1 ante. They may still be of relevance in the law of distress: see PARA 650 note 14 ante.

2 *Leame v Bray* (1803) 3 East 593; and see PARA 602 note 5 ante.

3 *Turley v Thomas* (1837) 8 C & P 103.

4 *Re Rosher, Rosher v Rosher* (1884) 53 LJ Ch 722; *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 at 551.

5 *Poingdestre v Royal Exchange Corpn* (1826) Ry & M 378; and see INSURANCE.

6 *Davis v Bowsher* (1794) 5 Term Rep 488; *Brandao v Barnett* (1846) 12 Cl & Fin 787, HL; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC.

7 *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18; and see the Marine Insurance Act 1906 s 29; and INSURANCE.

8 *Re Witt, ex p Shubrook* (1876) 2 ChD 489, CA.

9 *Lohre v Aitchison* (1878) 3 QBD 558 at 562, CA.

10 *Mulliner v Florence* (1878) 3 QBD 484, CA; *Turrill v Crawley* (1849) 13 QB 197; *Threfall v Borwick* (1875) LR 10 QB 210, Ex Ch.

11 *Edelstein v Schuler & Co* [1902] 2 KB 144; *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL; *London Joint Stock Bank v Simmons* [1892] AC 201, HL.

12 *French v Gething* [1922] 1 KB 236 at 250, CA; *Mullett v Green* (1838) 8 C & P 382; *Re Matthews, ex p Powell* (1875) 1 ChD 501, CA; *Crawcour v Salter* (1881) 18 ChD 30, CA; *Re Parker, ex p Turquand* (1885) 14 QBD 636, CA (usage applicable not only to furniture in strictest sense but also to articles necessary for furnishing hotel); *Re Chapman, ex p Whiteley* (1894) 1 Mans 415 (extension of usage to boarding house keepers as well as hotel keepers). The court has refused to take judicial notice of such a usage in the case of persons other than hotel and boarding house keepers: see *Re Jones, ex p Lovering* (1874) 9 Ch App 621 (furniture in draper's dwelling house and shop); *Re Fowler, ex p Brooks* (1883) 23 ChD 261, CA (ordinary householder); *Re Tabor, ex p Cork* [1920] 1 KB 808 (furniture on trade premises of wholesale grocer); *Re Kaufman, Segal and Domb, ex p Trustee* [1923] 2 Ch 89 (furniture used in business of clothing manufacturer and merchant). As to the hire-purchase of pianos see PARA 688 note 43 post. In *Re Tabor, ex p Cork* supra and *Re Kaufman, Segal and Domb, ex p Trustee* supra the court did not follow *Re Hawkins, ex p Emerson* (1871) 41 LJ Bcy 20, where it was said that there was a custom which prevented any hired furniture from being within the order and disposition of a bankrupt.

13 See *Whitfield v Brand* (1847) 16 M & W 282 at 285 per Parke B, and at 287 per Platt B; *Re Thickbroom, ex p Greenwood* (1862) 6 LT 558.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(7) MISCELLANEOUS USAGES/(i) Usages of Particular Trades and Professions/687. Codified trade usages.

(7) MISCELLANEOUS USAGES

(i) Usages of Particular Trades and Professions

687. Codified trade usages.

Since trade usage does not have to be immemorial, it is possible for a trade association or similar body to set it down in writing in the interests of certainty and uniformity. Codification may take the form of a declaration of usage, a code of trade regulations, such as the rules of the Stock Exchange, or a model standard form of contract or clauses. This is now sometimes achieved internationally, as in the case of the uniform customs settled by the International Chamber of Commerce[1]. In so far as such documents are expressly incorporated into contracts, the law relating to usage has no application. But the documents may be treated as evidence of a usage which may be incorporated into a contract by implication, provided that there is also evidence that the codified terms are in fact universally treated as binding by all those following the trade in question in the relevant place[2]. In the case of a trade association, the terms may only be binding on members of the association[3]. It is probable that the users of electronic communication systems are bound by terms in the current user handbooks, whether or not they have read them[4]. Where, on the other hand, the evidence is that the codified rules are only adopted by contracting parties if they so choose, such evidence will be treated as showing that the rules are not binding usages[5].

1 Eg the Uniform Customs and Practice for Documentary Credits, as to which see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 925. The Hague Rules and Hague-Visby Rules, which were settled by international convention, were incorporated into English law by the Carriage of Goods by Sea Act 1924 (repealed) and the Carriage of Goods by Sea Act 1971: see further CARRIAGE AND CARRIERS vol 7 (2008) PARAS 206, 367.

2 *Van Liewen v Hollis Bros & Co Ltd* [1920] AC 239, HL (printed declaration of custom by an association of timber exporters in Hull); *Armour & Co Ltd v C Tarbard Ltd* (1920) 37 TLR 208; *Lynch Bros Ltd v Edwards and Fase* (1921) 90 LJKB 506 (London Lighterage Clause incorporated from usage); *Woodward v Wolfe* [1936] 3 All ER 529 (regulations of Liverpool Cotton Exchange); *London Export Corpn Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411, [1958] 1 WLR 661, CA (regulations of the Incorporated Oil Seed Association); *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379 at 382 per Salmon LJ at first instance (Cargo Sales Agency Rules of the International Air Transport Association incorporated on the footing that importers by air were deemed to know of them); *Harlow & Jones Ltd v American Express Bank Ltd* [1990] 2 Lloyd's Rep 343 (ICC Rules for Collection incorporated into banking contract, upon evidence that they were subscribed to by all banks operating in England). For contracts impliedly incorporating the rules of the Stock Exchange see PARA 674 ante.

3 *The Leegas* [1987] 1 Lloyd's Rep 471 (London Underwriters Association Agreement held inadmissible in evidence where the parties were not members of the association).

4 See 55 Law and Contemporary Problems 39 at 95 (as to the SWIFT system used by banks).

5 See PARA 681 text and note 6 ante. This is sometimes indicated by the rules themselves. Eg the Rules for Electronic Bills of Lading (1990), drawn up by the Comité Maritime International, apply only if incorporated into a contract by express provision: 55 Law and Contemporary Problems 39 at 90.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(7) MISCELLANEOUS USAGES/(i) Usages of Particular Trades and Professions/688. Trade usages recognised in reported cases.

688. Trade usages recognised in reported cases.

A case in which a usage has been established cannot be regarded as conclusive authority that the particular usage still continues, for a usage may go out of vogue in the course of a few years, or even in a shorter time if circumstances change[1]. There may, however, be a presumption of continuance[2].

The following particular trade usages occur in the reported cases: barley and malt trades[3], bleachers[4], boarding house keepers[5], booksellers[6], brewers[7], brush trade[8], builders[9], calico

trade[10], carriers[11], cinema trade[12], clockmakers[13], cloth trade[14], coach-builders[15], coal merchants[16], coffee trade[17], corn merchants[18], cotton trade[19], cycle trade[20], diamond trade[21], distillers[22], dry goods trade[23], drug trade[24], East India trade[25], farmers[26], fur trade[27], furniture dealers[28], glovers[29], hay trade[30], hemp trade[31], hop trade[32], horse dealers[33], horse racing[34], hotel keepers[35], iron and steel trade[36], jewellers[37], linen trade[38], London freight market[39], oil and oil seed trades[40], packing trade[41], paraffin wax trade[42], piano dealers[43], plant hire trade[44], pottery trade[45], printers[46], provision and grocery trades[47], publicans[48], shellac trade[49], shipbuilders[50], stone trade[51], theatrical managers[52], timber trade[53], tobacco trade[54], undertakers[55], warehousemen[56], weaving trade[57], wharfingers[58], wine and spirit trade[59], wool trade[60].

1 See eg *Ropner & Co v Stoate, Hosegood & Co* (1905) 92 LT 328; and see also PARAS 655, 683 note 4 ante.

2 *Re Witt, ex p Shubrook* (1876) 2 ChD 489 at 492, CA, per Mellish LJ (a case of reputed ownership).

3 *Stonard v Dunkin* (1809) 2 Camp 344 (sale of malt in warehouse); *Carter v Crick* (1859) 4 H & N 412 (meaning of 'seed barley'); see also the text and notes 7, 22 infra.

4 *Ex p Aynsworth* (1799) 4 Ves 678 (discounts); *Plaice v Allcock* (1866) 4 F & F 1074 (Nottingham; payment of accounts); *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 LJKB 834, CA (lien on calico sent to bleacher by a calico printer).

5 See *Re Chapman, ex p Whiteley* (1894) 1 Mans 415; and see PARA 686 note 12 ante.

6 *Whittaker v Mason* (1835) 2 Bing NC 359; *Whitfield v Brand* (1847) 16 M & W 282 (books on sale on commission); and see PARA 686 text and note 13 ante.

7 *Studdy v Sanders* (1826) 8 Dow & Ry KB 403 (meaning of 'cyder'); *Harris v Truman* (1881) 7 QBD 340; on appeal (1882) 9 QBD 264, CA (provision of capital for purchase of barley); see also the text and note 3 supra, and the text and notes 22, 48 infra.

8 *R v Metcalf* (1817) 2 Stark 249 (meaning of 'tapering').

9 *Moon v Witney Union Guardians* (1837) 3 Bing NC 814; *Symonds v Lloyd* (1859) 6 CBNS 691 (reduction of brickwork in building brick walls where brick and stone used in same building); *Myers v Sarl* (1860) 3 E & E 306 (meaning of 'weekly account'); *North v Bassett* [1892] 1 QB 333 (quantity surveys); see also PARA 690 text and note 5 post. See generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARAS 34-35.

10 *Laclouch v Towle* (1800) 3 Esp 114 (goods damaged in printing); *Bowman v Horsey* (1837) 2 Mood & R 85 (delivery by packers); *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 LJKB 834, CA (lien for bleaching); see also the text and note 19 infra.

11 *Rushforth v Hadfield* (1805) 6 East 519 (general lien).

12 *Bramhall Tudor Cinema Properties Ltd v Brennan's Cinemas Ltd* (1955) 166 Estates Gazette 528, CA (meaning of 'gross takings' in cinema lease).

13 *Hamilton v Bell* (1854) 10 Exch 545 (clocks left for repairs).

14 *Wood v Wood* (1823) 1 C & P 59 (sending goods for inspection).

15 *Bartram v Payne* (1827) 3 C & P 175 (carriages built to order to be put in showrooms before delivery).

16 *Holl v Hadley* (1828) 5 Bing 54 (London; daily supply to dealer and mode of payment); *Watson v Peache* (1834) 1 Bing NC 327 (London; names of hired barges); *Boden v French* (1851) 10 CB 886 at 887 (London; sale on credit unless sold at wharf); *Société Anonyme L'industrielle Russo-Belge v Scholefield* (1902) 7 Com Cas 114, CA (Newcastle; vendors to have option of 5% above or below quantity specified in contract for sale).

17 *Zwinger v Samuda* (1816) Holt NP 395 (delivery warrants).

18 *Heisch v Carrington* (1833) 5 C & P 471 (London; purchaser to pay factor upon discount within two months); *Hutchison v Bowker* (1839) 9 LJ Ex 24 (London; difference between 'good' and 'fine' barley); *Johnston v Usborne* (1840) 11 Ad & El 549 (London; brokers selling on behalf of foreign principals to be named in contract and liable to purchasers as principals); *Sanders v Jameson* (1848) 2 Car & Kir 557 (Liverpool; right to reject on sale by sample); *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 (London; purchaser's

right to reject for difference or variation in quality); *EE and Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302, [1939] 2 All ER 251 (London; right of buyer to have his right to reject decided and then claim damages in another arbitration).

19 *Taylor v Briggs* (1827) 2 C & P 525 (Liverpool and American; meaning of 'bale'); *Hubbard v Bagshaw* (1831) 4 Sim 326 (Yorkshire; lease of mill); *Bottomley v Forbes* (1838) 5 Bing NC 121 (Bombay; manner of measuring cotton cargoes); *Inman v Clare* (1858) 5 Jur NS 89 (Liverpool; broker's duty to apply proceeds of sale in payment of acceptances); cf *Catterall v Hindle* (1867) LR 2 CP 368, Ex Ch (whether payment to broker is good payment as against the principal); *Buckle v Knoop* (1867) LR 2 Exch 333 (Liverpool; measurement of Bombay cotton cargoes); *Ashforth v Redford* (1873) LR 9 CP 20 (Manchester; credit on sale of cotton-wefts); see also the text and note 10 supra.

20 *John Griffiths Cycle Corpn Ltd v Humber & Co Ltd* [1899] 2 QB 414, CA (retailers described as agents for sale in contracts).

21 *Oppenheimer v Attenborough & Son* [1908] 1 KB 221, CA (authority of broker to pledge).

22 *Horn v Baker* (1808) 9 East 215 at 239 (hire of vats, etc); see also the text and notes 3, 7 supra (barley and malt trades; brewers).

23 *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 (London; broker liable for default of undisclosed principal).

24 *Jones v Bowden* (1813) 4 Taunt 847 (sea damage to pimento); *Humphries v Carvalho* (1812) 16 East 45 (right of principal to disapprove contract made by broker).

25 *Coventry v Gladstone* (1867) LR 4 Eq 493 (bills of lading).

26 *Re Terry, ex p Vidler* (1862) 7 LT 370; *Pennell v Fox* (1859) 1 F & F 617; *Priestley v Pratt* (1867) LR 2 Exch 101; *Re James, ex p Swansea Mercantile Bank Ltd* (1907) 24 TLR 15, CA (animals or crops purchased left on vendor's premises); as to agistment see *Re Woodward, ex p Huggins* (1886) 3 Morr 75; *Re James, ex p Swansea Mercantile Bank Ltd supra*; and see AGRICULTURAL LAND vol 1 (2008) PARA 352 et seq.

27 *Bevington and Morris v Dale & Co Ltd* (1902) 7 Com Cas 112 (loss of or damage to goods on approval).

28 *Re Fowler, ex p Brooks* (1883) 23 ChD 261, CA (hire purchase); *Re Ford, ex p Trustee, Restall, Brown and Clennell's Case* [1929] 1 Ch 134 (antique furniture on sale or return).

29 *Chawner v Cummings* (1846) 8 QB 311 (letting of glove-making frames to workman and deduction of rent from earnings); *Joynson v Hunt & Son* (1905) 93 LT 470, CA (length of notice to determine commission agency).

30 *Lord Eldon v Hedley Bros* [1935] 2 KB 1, CA (property passing at time of bargain).

31 *Moore v Campbell* (1854) 10 Exch 323 (form of delivery orders).

32 *Parkinson v Lee* (1802) 2 East 314 (sale by sample; warranty that hops are merchantable; *Thackthwaite v Cock* (1811) 3 Taunt 487 at 491 (purchaser's right to leave goods in vendor's warehouse pending resale; see, however, *Watson v Peache* (1834) 1 Bing NC 327; and *Re Taylor, ex p Dyer* (1885) 53 LT 768 at 769); *Bloxam v Sanders* (1825) 4 B & C 941; *Spicer v Cooper* (1841) 1 QB 424 ('at' so many shillings meant so many shillings per hundredweight); *Collard v South-Eastern Rly Co* (1861) 30 LJ Ex 393 (right to reject hops partially stained by damp); *Durrell v Evans* (1862) 1 H & C 174, Ex Ch (time for payment); *Pike v Ongley* (1887) 18 QBD 708, CA (broker for undisclosed principal treated as principal); *Cooper v Strauss* (1898) 14 TLR 233 (factor treated as principal); *Peene v Taylor* (1916) 32 TLR 674 (right of purchaser to accept packets in merchantable condition and reject those not; right of vendor to make good defects).

33 *Howard v Sheward* (1866) LR 2 CP 148; *Chapman v Gwyther* (1866) LR 1 QB 463; *Re Leigh's Estate, Rowcliffe v Leigh* (1877) 6 ChD 256 (London; terms of sale as between dealer and owner); *Re Florence, ex p Wingfield* (1879) 10 ChD 591, CA (horses entrusted to dealers on sale or return); *Ormond v Vergette* (1909) 127 LT Jo 85 (warranty).

34 *Evans v Pratt* (1842) 3 Man & G 759 (meaning of race 'across country'); *Forth v Simpson* (1849) 13 QB 680 (selection of races and jockeys by owner); *Abbott v Bates* (1875) 45 LJQB 117 (meaning of 'necessaries' in contract between trainer and apprentice); *Re Mahon* [1918] 2 IR 460 (lease of racehorse).

35 As to the usage of hotel keepers to hire furniture and other articles necessary for furnishing hotels see PARA 686 text and note 12 ante. See also *Newport v Hollings* (1827) 3 C & P 223 (hire of carriage).

36 *Crawshay v Homfray* (1820) 4 B & Ald 50 (payment of sums due for wharfage); *Rufford v Bishop* (1829) 5 Russ 346 (lease of ironworks); *Re Nicholls, ex p Wiggins* (1832) 2 Deac & Ch 269 (hire of horses from carting contractors); *Dunlop v Higgins* (1848) 1 HL Cas 381 (usage to accept or reject offers in course of post); *Mackenzie v Dunlop* (1856) 3 Macq 22, HL (meaning of 'No 1 pig-iron'); *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491 (delivery warrants); *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 ChD 205; *Johnson v Raylton* (1881) 7 QBD 438, CA (manufacturer of iron plates to supply plates of his own make); *Re Lock, ex p Poppleton* (1891) 63 LT 839 (delivery of safes to dealers on sale or return); *Vickery's Patents Ltd v Hill* (1917) 33 TLR 536 (defective castings).

37 *Blanckensee & Son Ltd v Saqui* (1917) 33 TLR 246 (goods on sale or return at risk of consignee).

38 *Swancott v Westgarth* (1803) 4 East 75 (usual period of credit); *Ross Bros Ltd v Shaw & Co* [1917] 2 IR 367 (Belfast; delivery of yarn on notice).

39 *Anglo-Overseas Transport Co Ltd v Titan Industrial Corpn (United Kingdom) Ltd* [1959] 2 Lloyd's Rep 152; *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58 at 63 (personal liability of forwarding agents and brokers to ship's agents).

40 *Bold v Rayner* (1836) 1 M & W 343 (delivery of palm oil from quay at landing weights); *Warde v Stuart* (1856) 1 CBNS 88 (meaning of 'wet' palm oil); *Dale v Humfrey* (1858) EB & E 1004; *Hutchinson v Tatham* (1873) LR 8 CP 482; *Southwell v Bowditch* (1876) 1 CPD 374, CA; *Pike v Ongley* (1887) 18 QBD 708 (broker for undisclosed principal liable as principal); *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1917] 1 KB 320, CA (appropriation of oil seed to contract); *Boks & Co v JH Rayner & Co* (1921) 37 TLR 800, CA (examination of oil by buyer before loading); *London Export Corpn Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411, [1958] 1 WLR 661, CA (arbitration procedure permitting the umpire to be present at proceedings on appeal from umpire's award to board of appeal constituted in accordance with the regulations of the Incorporated Oil Seed Association, held irregular).

41 *Ex p Deeze* (1748) 1 Atk 228; *Green v Farmer* (1768) 4 Burr 2214; *Re Witt, ex p Shubrook* (1876) 2 ChD 489, CA (lien); *Bowman v Horsey* (1837) 2 Mood & R 85 (delivery of calico goods).

42 *Palmer & Co Ltd v Pilot Trading Co Ltd* (1929) 45 TLR 214 (arbitration).

43 *Re Blanshard, ex p Hattersley* (1878) 8 ChD 601 (hire purchase); see also *Hoffman v MacFarlane* (1875) 2 JR 82 (NZ); but see *Chappell & Co Ltd v Harrison* (1910) 103 LT 594, where the court refused to take judicial notice of the usage. As to the effect on the authority of decided cases of the increased prevalence of hire-purchase see PARA 686 note 12 ante.

44 *British Crane Hire Corpn v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (standard form of contract). As to standard form contracts see generally CONTRACT vol 9(1) (Reissue) PARA 771.

45 *Grainger v Aynsley* (1880) 6 QBD 182 (term of employment); *R v Stoke-upon-Trent Inhabitants* (1843) 5 QB 303 (holidays).

46 *Gillet v Mawman* (1808) 1 Taunt 137 (payment on completion); *Bleaden v Hancock* (1829) 4 C & P 152 (lien on stereotype plates); *Re Thackrah, ex p Hughes and Kimber Ltd* (1888) 5 Morr 235 (hire of plant and machinery); *Hippisley v Knee Bros* [1905] 1 KB 1 (trade discount).

47 *Dickinson v Lilwal* (1815) 4 Camp 279 (Irish provision trade; termination of broker's general authority to sell); *Yates v Pym* (1816) 6 Taunt 446 (bacon trade; latitude for deterioration, 'average taint'); *Trueman v Loder* (1840) 11 Ad & El 589; *Fleet v Murton* (1871) LR 7 QB 126 (London fruit trade; liability as principals of brokers acting for undisclosed principals); *Robinson v Mollett* (1875) LR 7 HL 802 (tallow trade; liability as principals of brokers acting for undisclosed principals); *Bacmeister v Fenton, Levy & Co* (1883) Cab & El 121 (rice trade; liability as principals of brokers acting for undisclosed principals); *Lister and Biggs v Barry & Co* (1886) 3 TLR 99 (Calcutta tea trade; reliance on weights marked on boxes); *Re Jensen, ex p Callow* (1886) 4 Morr 1, DC (grocers; hire of delivery vans); *Borthwick v Bank of New Zealand* (1900) 6 Com Cas 1 (New Zealand frozen meat trade; documents to include 'all risks' policy); *Anderson v Britcher* (1913) 110 LT 335 (English provision trade; meaning of 'Demerara sugar'); *Caraman, Rowley and May v Aperghis* (1923) 40 TLR 124 (dried fruit; terms of sale of sultanas).

48 *Menzies v Lightfoot* (1871) LR 11 Eq 459 at 469 (London; mortgage to brewers).

49 *FE Hookway & Co Ltd v Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep 491 (practice of visual test only to decide quality did not amount to custom).

50 *Raitt v Mitchell* (1815) 4 Camp 146; *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498, HL (repair of paddle wheels); *Re Westlake, ex p Willoughby* (1881) 16 ChD 604 (Thames; credit for cost of repairing).

51 *Luard v Butcher* (1846) 2 Car & Kir 29 (Caen stone; payment of freight); *Dickenson v Lano* (1860) 2 F & F 188 (Portland stone: shipping notes).

52 *Chappell & Co Ltd v Harrison* (1910) 103 LT 594 (pianos on loan).

53 *Gould v Oliver* (1837) 4 Bing NC 134 (Canadian; stowage of timber on deck); *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, HL (Baltic trade; liability of charterer or consignee to provide berth in London); *Burton v English* (1883) 12 QBD 218, CA (Baltic; carriage of deck cargoes); *Young v Canning Jarrah Timber Co Ltd* (1899) 4 Com Cas 96 (hardwood timber; measurement of cross dimensions); *Rodenacker v May and Hassell Ltd* (1901) 6 Com Cas 37 (Danzig oak; mode of discharge); *Thomas Gabriel & Sons v Churchill and Sim* [1914] 1 KB 449 at 455; affd on other grounds [1914] 3 KB 1272, CA (liability on contract of broker receiving del credere commission); *Mowbray, Robinson & Co v Rosser* (1922) 91 LJKB 524, CA (American; meaning of 'shipment').

54 *Syers v Jonas* (1848) 2 Exch 111 (sale by sample); *Johnson v Crédit Lyonnais Co* (1877) 2 CPD 224; on appeal 3 CPD 32, CA (tobacco purchased remaining in bond until required).

55 *Re Torrens, ex p John Marston's Carriage Works Ltd* [1924] 2 IR 1, CA (hearses and funeral coaches on hire purchase).

56 *Holderness v Collinson* (1827) 7 B & C 212; *Fawkes v Lamb* (1862) 31 LJQB 98 (London; allowances for warehouse rent on sales of rum); *Dresser v Bosanquet* (1863) 32 LJQB 374, Ex Ch (general lien); *Re Hancock, ex p Ludlow* [1879] WN 65; *Re Catford, ex p Carr v Ford* (1894) 71 LT 584.

57 *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, CA; following *Hart v Riversdale Mill Co Ltd* [1928] 1 KB 176, CA (deductions from wages for faulty work).

58 *Holderness v Collinson* (1827) 7 B & C 212 (Hull: general lien).

59 *Knowles v Horsfall* (1821) 5 B & Ald 134 (Liverpool; wine purchased remaining in bond till required); *Gregson v Ruck* (1843) 4 QB 737 (London colonial rum trade; meaning of 'prompt payment'); *Re Couston, ex p Watkins* (1873) 8 Ch App 520; *Re Couston, ex p Vaux* (1874) 9 Ch App 602; *Knowles v Horsfall* supra (Liverpool; wine purchased remaining warehoused till required); *Re Hancock, ex p Ludlow* [1879] WN 65 (Bristol; general lien of wine merchants).

60 *Graves v Legg* (1857) 2 H & N 210 (Liverpool; notice to broker equivalent to notice to principal); *Cropper v Cook* (1868) LR 3 CP 194 (Liverpool; broker's form of contract); *Australian Agricultural Co v Saunders* (1875) LR 10 CP 668, Ex Ch (Australian wool; compression into bales).

689. Solicitors.

Usages have been recognised as to the liability of certain parties for the payment of costs and expenses incurred by other parties in transactions concerning legal affairs, and as to the rights and duties of such parties in transactions of this kind. For example there is a usage in the legal profession that, in the absence of any stipulation to the contrary, the lessor or his solicitor prepares the lease[1]. It was formerly also the usage that the lessee bore all the costs and expenses of the preparation and execution of the lease[2], but it is now provided by statute that, notwithstanding any custom to the contrary, a party to a lease, unless the parties agree otherwise in writing, is to be under no obligation to pay the whole or any part of any other party's solicitor's costs of the lease[3]. There is a general usage which requires the lessor to pay for the costs and expenses of the preparation and execution of the counterpart lease, unless the agreement between the parties otherwise provides[4]. It was the recognised usage in the nineteenth century for a marriage settlement to be drawn up by the bride's solicitor, on the footing that the groom would pay the costs[5].

1 *Smith v Clegg* (1858) 27 LJ Ex 300.

2 See note 1 supra.

3 Costs of Leases Act 1958 s 1. For this purpose 'lease' includes an underlease and an agreement for a lease or underlease or for a tenancy or sub-tenancy; and 'costs' includes fees, charges, disbursements (including stamp duty), expenses and remuneration: s 2.

4 *Re Negus* [1895] 1 Ch 73 at 81 per Chitty J; *Jennings v Major* (1837) 8 C & P 61; see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 121; and see generally LEGAL PROFESSIONS.

5 *Helps v Clayton* (1864) 17 CBNS 553. In so far as this usage imposed liability on someone who was not party to the retainer, it may perhaps be explained as a kind of implied agency.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(7) MISCELLANEOUS USAGES/(i) Usages of Particular Trades and Professions/690. Other professions and occupations.

690. Other professions and occupations.

There are many usages which have been upheld affecting the position of brokers dealing in different markets and trades[1]. Those usages which affected the length of notice required to terminate employment in various occupations[2] have, however, generally been superseded by statute[3].

A number of usages have been considered affecting the position of bankers[4] and in respect of architects[5], auctioneers[6], schoolteachers[7], estate agents[8], commercial travellers[9], domestic servants[10] and other employees[11], and theatrical professions[12].

There cannot be a usage in respect of goods consigned to agents for sale with a minimum limit of price that the agents may themselves purchase the goods at the minimum[13].

1 As to trade usages see generally para 688 ante. For usages affecting brokers on the Stock Exchanges see PARA 674 ante.

The following usages have been recognised in the case of shipbrokers: *Cohen v Paget* (1814) 4 Camp 96 (broker's commission on chartering ship for Baltic trade); *Read v Rann* (1830) 10 B & C 438 (London; broker's right to commission on amount of freight if contract effected); *Burnett v Bouch* (1840) 9 C & P 620 (broker's right to commission for effecting introduction where charterparty prepared by someone else); *Smith v Boutcher* (1844) 1 Car & Kir 573 (Liverpool; broker's right to commission when he employs another to procure charter); *Hibbert v Owen* (1859) 2 F & F 502 (application of charterparty to outward and inward voyages); *Allan v Sundius* (1862) 1 H & C 123 (broker effecting introduction entitled to commission on subsequent charters between same parties); *Jessel v Bath* (1867) LR 2 Exch 267 (shipping agents signing bills of lading in Mediterranean ports); *Hutchinson v Tatham* (1873) LR 8 CP 482 (liability of broker for undisclosed charterer); *Lilly, Wilson & Co v Smales, Eeles & Co* [1892] 1 QB 456 (form in which brokers sign charters acting on telegraphic instruction); *Hine Bros v Steamship Insurance Syndicate Ltd* (1895) 72 LT 79, CA (settlement of loss between broker and underwriter and receipt by broker of payment on behalf of assured); *Affréteurs Réunis Société Anonyme v Leopold Walford (London) Ltd* [1919] AC 801, HL, discussing *Harley & Co v Nagata* (1917) 34 TLR 124 (payment of broker's commission on time charterparty out of hire earned); *Goodey and Southwold Trawlers Ltd v Garriock, Mason and Millgate* [1972] 2 Lloyd's Rep 369 (deposit paid by prospective purchaser received as agent of shipowner and not as stakeholder).

For usage affecting the negotiability of various instruments see PARA 664 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1610-1619.

2 Eg *Nowlan v Ablett* (1835) 4 LJ Ex 155 (gardener; one month's notice); *Gordon v Potter* (1859) 1 F & F 644 (domestic servant; one month's notice); *Nicoll v Greaves* (1864) 17 CBNS 27 (huntsman; enjoyment for season); *Foxall v International Land Credit Co* (1867) 16 LT 637 (clerk; three months' notice); *Grundon v Master & Co* (1885) 1 TLR 205 (commercial traveller; three months' notice); *Wright v Marquis of Zetland* [1908] 1 KB 63, CA (schoolmaster; one term's notice: but in the instant case this was overridden by the Endowed Schools Act 1869 (now repealed). Cf *Beeston v Collyer* (1827) 4 Bing 309 (clerk; one month's notice, in the absence of any evidence as to usage).

3 See the Employment Rights Act 1996 s 86 (minimum periods of notice); and EMPLOYMENT vol 40 (2009) PARAS 692-693.

4 *Davis v Bowsher* (1794) 5 Term Rep 488; *Boddington v Schlencker* (1833) 4 B & Ad 752 (presentation of cheques at clearing house); *Brandao v Barnett* (1846) 12 Cl & Fin 787, HL (general lien); *Adams v Peters* (1849) 2 Car & Kir 723 (London bankers and country correspondents); *Schweitzer v Long* (1863) 3 F & F 687 (acceptance of bills of exchange by colonial brokers); *London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC; *Earl of Sheffield v London Joint Stock Bank Ltd* (1888) 13 App Cas 333, HL (deposit by moneylenders of securities pledged to them to secure loans by bankers); *Lloyds Bank Ltd v Swiss Bankverein* (1913) 108 LT 143, CA (constructive possession of securities returned by bankers in exchange for cheques of bill brokers). See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.

5 *Lansdowne v Somerville* (1862) 3 F & F 236 (payment for taking out quantities when building abandoned); *Locke v Morter* (1885) 2 TLR 121 (recovery of commission from builder); *Brocklebank v Lancashire and Yorkshire Rly Co* (1887) 3 TLR 575, CA (fees based on amount awarded in arbitration proceedings); *Gibbon v Pease* [1905] 1 KB 810, CA (property in plans); *Knox and Robb v Scottish Garden Suburb Co Ltd* 1913 SC 872 (liability for measurer's fees); see generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 220 et seq.

6 *Rainy v Vernon* (1840) 9 C & P 559 (right to commission on sale being effected otherwise than through auctioneer's direct agency); *Marsh v Jelf* (1862) 3 F & F 234 (sale by private treaty after abortive auction); *Re Page (No 3)* (1863) 11 WR 584 (percentage remuneration). See generally AUCTION vol 2(3) (Reissue) PARA 206 et seq.

7 *Wright v Marquis of Zetland* [1908] 1 KB 63, CA (universal usage established by verdict, that a master is entitled to a term's notice; not applied in the instant case because overridden by the Endowed Schools Act 1869 (now repealed)); *Mount v Oldham Corpn* [1973] QB 309 at 315, [1973] 1 All ER 26 at 28, CA, per Lord Denning MR (a term's notice, or fees in lieu thereof, required for the removal of a pupil).

8 *Murray v Currie* (1836) 7 C & P 584 (right to commission for finding purchaser); *McGowan v Brown and Cousins* [1977] 3 All ER 844, [1977] 1 WLR 1403 (developer expected to retain same agent who had acquired site for more remunerative but less arduous work of selling or letting the property built on it; this seems to have been little more than a usual understanding in Croydon). See further AGENCY vol 1 (2008) PARA 103.

9 *Metzner v Bolton* (1854) 9 Exch 518 (commercial traveller; allegation of custom).

10 *Turner v Mason* (1845) 14 M & W 112 (domestic servant; wilful disobedience).

11 *Read v Dunsmore* (1840) 9 C & P 588 (journeymen carpenters; travelling expenses); *Bettany v Eastern Morning and Hull News Co* (1900) 16 TLR 401 (advertising agent; commission on orders received after dismissal).

12 *Grant v Maddox* (1846) 15 M & W 737 (payment when theatre is closed); *White v Henderson* (1885) 2 TLR 119 (right of actor engaged to play a part to 'open' in the part); *George Edwardes (Daly's Theatre) Ltd v Comber* (1926) 42 TLR 247; following *Clayton-Greene v De Courville* (1920) 36 TLR 790 (engagement for the run of the play); see also the text and note 3 supra; *Cotton v Sounes* (1902) 18 TLR 456 (performance of other plays at theatre during run of a play); *Newman v Gatti* (1907) 24 TLR 18, CA (understudies). See further LICENSING AND GAMBLING vol 67 (2008) PARA 238.

13 *De Bussche v Alt* (1878) 8 ChD 286 at 317, CA.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(7) MISCELLANEOUS USAGES/(ii) Usages between Landlord and Tenant/691. Customs of the country and tenant-right.

(ii) Usages between Landlord and Tenant

691. Customs of the country and tenant-right.

The common law has done so little to prescribe the relative duties of landlord and tenant, leaving the latter at liberty to pursue any course of management he pleases provided he is not guilty of waste, that the courts have been favourably inclined to the introduction of such

regulations in the mode of cultivation as have been shown by experience in any district to be the most beneficial to all parties[1]. These customary regulations, which are almost invariably concerned with matters relating to agricultural tenancies[2], including the meaning of timber[3], are known as 'customs of the country' or, when they relate to rights at the end of a tenancy, 'tenant-right', and are considered elsewhere in this work[4]. Tenant-right in this sense, so far as it relates to compensation for certain matters, has been put on a statutory basis[5].

1 *Hutton v Warren* (1836) 1 M & W 466 at 476 per Parke B.

2 See *Dashwood v Magniac* [1891] 3 Ch 306 at 370, CA.

3 See eg *Whitty v Lord Dillon* (1860) 2 F & F 67; and see generally FORESTRY vol 52 (2009) PARA 54. However, for purposes unconnected with contract (which may be considered as including a tenancy for years), nothing short of an immemorial local custom will suffice to define timber differently from the common law: *Dashwood v Magniac* [1903] 3 Ch 306 at 370, CA, per Kay LJ.

4 See AGRICULTURAL LAND vol 1 (2008) PARAS 352 et seq (customs of the country), 364 et seq (tenant-right).

5 See the Agricultural Holdings Act 1986; and AGRICULTURAL LAND vol 1 (2008) PARA 431 et seq. Tenant-right here is not to be confused with the immemorial form of tenure in the north of England, as to which see PARA 643 note 1 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(7) MISCELLANEOUS USAGES/(iii) Port and Maritime Usages/692. Customs of the port.

(iii) Port and Maritime Usages

692. Customs of the port.

There are usages in many seaports, generally known as 'customs of the port', which have been frequently established in litigation[1].

Usages have been considered in respect of the following ports in the United Kingdom: Avonmouth[2], Belfast[3], Bristol[4], Cardiff[5], Fowey[6], Garston[7], Gloucester[8], Great Yarmouth[9], Grimsby[10], Hull[11], Leith[12], Liverpool[13], London[14], Lowestoft[15], Middlesbrough[16], Newcastle[17], Newlyn[18], Sunderland[19], Wells[20], West Hartlepool[21], Whitehaven[22].

1 Most of the cases cited in this and the following paragraphs arose from express clauses in charterparties either referring to the custom of the port or using phrases like 'as customary'. The dearth of modern cases may be attributed to the widespread disuse of customary laytime clauses in charterparties. As to customs of the port see also SHIPPING AND MARITIME LAW.

2 *Armement Adolph Deppe v John Robinson & Co Ltd* [1917] 2 KB 204 at 211, CA (mode of and time for discharging; usage not established).

3 *Northmoor Steamship Co v Harland and Wolff Ltd* [1903] 2 IR 657 (delivery of log timber).

4 *Budgett & Co v Binnington & Co* (1890) 25 QBD 320; affd [1891] 1 QB 35, CA (discharge of grain; usage not established); *Ropner & Co v Stoate, Hosegood & Co* (1905) 92 LT 328 (rate of discharge; usage not established); *Cazalet v Morris & Co* 1916 SC 952 at 961, 964 (discharge of esparto grass; usage doubtful).

5 *Kay v Field* (1882) 8 QBD 594; revsd on the construction of the charterparty 10 QBD 241, CA (loading steamers with iron); *Coverdale v Grant* (1883) 11 QBD 543, CA; affd sub nom *Grant & Co v Coverdale, Todd & Co* (1884) 9 App Cas 470, HL; *Lyle Shipping Co v Cardiff Corpn* (1899) 69 LJQB 93; affd [1900] 2 QB 638, CA (supply of railway wagons to convey cargoes from ships); *HG Harper & Co v J Bland & Co Ltd* (1914) 84 LJKB 738 (collection of money due in respect of freight).

6 *The Sheila* [1909] P 31n (turns of loading at jetties).

7 *Castlegate Steamship Co v Dempsey* [1892] 1 QB 854, CA (discharge by dock company).

8 *Nielsen v Wait* (1885) 16 QBD 67, CA; *Reynolds & Co v Tomlinson* [1896] 1 QB 586 (discharge of grain cargoes); *The Alne Holme* [1893] P 173 (discharge of timber cargoes); *Sea Steamship Co Ltd v Price, Walker & Co Ltd* (1903) 8 Com Cas 292 (rate of discharge; usage not established).

9 *The Nifa* [1892] P 411; *Palgrave, Brown & Son Ltd v SS Turid* [1922] 1 AC 397, HL (discharge on quay).

10 *Monsen v Macfarlane & Co* [1895] 2 QB 562, CA (loading berth for coal); *Stephens v Winteringham* (1898) 3 Com Cas 169 (discharge of timber); *The Rehearo* [1933] P 286 (repairs in dry dock).

11 *Holderness v Collinson* (1827) 7 B & C 212 (wharfingers' general lien); *Brown v Johnson* (1842) 10 M & W 331 (meaning of 'days' in charterparty); *Aktieselskabet Hekla v Bryson, Jameson & Co* (1908) 100 LT 155; *Peninsular and Oriental Steam Navigation Co v H Leetham & Sons Ltd and Keighley, Maxsted & Co* (1915) 32 TLR 153 (pro rata delivery of wheat escaping from burst or leaky bags to consignees of several parcels); *Van Liewen v Hollis Bros & Co Ltd* [1920] AC 239, HL (timber cargo; receiver to provide berth); *Rederi Aktiebolaget Acolus v WN Hillas & Co Ltd* (1925) 30 Com Cas 271; affd (1926) 96 LJKB 186, HL (discharge of cargo).

12 *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134, HL (bulking of cargoes of grain in hold and on unloading hoisting in tubs to deck and repacking in sacks; usage not recognised).

13 *Bold v Rayner* (1836) 1 M & W 343 (delivery of palm oil); *Kearon v Pearson* (1861) 7 H & N 386, 31 LJ Ex 1 (meaning of 'usual dispatch' as applied to loading of coal); *Falkner v Earle* (1863) 32 LJQB 124 (discount on freight payable under bill of lading from USA); *Pust v Dowie* (1865) 5 B & S 20 (affd 5 B & S 33, Ex Ch) (loading with one-third weight goods and two-thirds measurement goods); *Norden Steamship Co v Dempsey* (1876) 1 CPD 654 (timber ships; lay days); *The Sarah* (1878) 3 PD 39 (remuneration of master and crew of salvage tug; usage not established); *The Jaederen* [1892] P 351 (discharge by dock company's servants); *Cardiff Steamship Co Ltd v Jameson* (1903) 88 LT 87, DC (expenses of trucking dried fruit from shed and piling in transit shed).

14 In the following cases usages were established: *Rucker v London Assurance Co* (1784) 2 Bos & P 432n (discharge of cargoes by wharfingers); *Catley v Wintringham* (1792) Peake 202 (care of goods during unloading into lighter); *Wardell v Mourillyan* (1798) 2 Esp 693 (delivery of goods by hoymen); *Cochran v Retberg* (1800) 3 Esp 121 (meaning of 'days' in bill of lading with reference to discharge of cargo); *Hurry v Royal Exchange Assurance Co* (1801) 2 Bos & P 430 (Russian trade; unloading into public lighters); *Cobban v Downe* (1803) 5 Esp 41 (delivery by wharfingers to mate and crew of outward bound ship); *Watson v Peache* (1834) 1 Bing NC 327 (coal merchants' names on hired barges); *Bourne v Gatliffe* (1841) 3 Man & G 643, Ex Ch; on appeal (1844) 7 Man & G 850, HL (storage until delivery to consignees); *Alexiadi v Robinson* (1861) 2 F & F 679 (discharge of perishable goods (fruit) on to quay if delivery not taken immediately the vessel was ready to discharge); *Petrocochino v Bott* (1874) LR 9 CP 355 (Victoria Docks; unloading and warehousing by dock company); *Pearson v Commercial Union Assurance Co* (1876) 1 App Cas 498, HL (repair of paddlewheels); *Marzetti v Smith & Co* (1883) Cab & El 6, CA (general cargoes landed on the quay); *Aste, Son and Kercheval v Stumore, Weston & Co* (1884) Cab & El 319 (discharge of grain on quay if delivery not taken); *Borrowman, Phillips & Co v Wilson & Co* (1891) 7 TLR 416 (delivering 'overside'); *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83, CA; *Young v Canning Jarrah Timber Co Ltd* (1899) 4 Com Cas 96 (measurement of timber cargoes); *Brenda Steamship Co v Green* [1900] 1 QB 518 at 519, CA; *Rodenacker v May and Hassell Ltd* (1901) 6 Com Cas 37 (Millwall Dock; discharge of logs into railway trucks); *Hulthen v Stewart & Co* [1903] AC 389, HL (stowage of timber unloaded into barges or on quay); *Glasgow Navigation Co v WW Howard Bros & Co* (1910) 102 LT 172; *Lawrence & Co v Produce Brokers Ltd* (1920) 4 Ll L Rep 231; *Armour & Co Ltd v C Tarbard Ltd* (1920) 37 TLR 208; *Lynch Bros Ltd v Edwards and Fase* (1921) 90 LJKB 506 (implied lighterage clause exempting lightermen from liability for loss however caused); *Smith Hogg & Co Ltd v Louis Bamberger & Sons* [1929] 1 KB 150, CA.

In the following cases usages were not established: *Coulthurst v Sweet* (1866) LR 1 CP 649 (freight payable on goods shipped in bulk); *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, HL (Baltic timber trade; importers to provide berths); *Pollitzer v SS Cascapedia* (1886) 2 TLR 413 (lighters sent by consignees for goods comprised in different bills of lading); *Pollitzer v SS Cascapedia supra* (lighters sent by consignees for different parcels comprised in bill of lading); *Grey v Butler's Wharf Ltd* (1898) 3 Com Cas 67 (overtime to lightermen discharging sugar cargoes); *Marwood v Taylor* (1901) 6 Com Cas 178, CA (weighing of grain discharged in bags).

15 *The Alhambra* (1881) 6 PD 68, CA (discharge outside post in the roads).

16 *Thiis v Byers* (1876) 1 QBD 244 (discharge of timber cargoes); *Maritime Stores Ltd v HP Marshall & Co Ltd* [1963] 1 Lloyd's Rep 602 (port agents ordering goods to be supplied to vessels on behalf of owners and charterers personally liable for the price; usage not proved).

17 *Leidemann v Schultz* (1853) 14 CB 38 (entry of chartered vessel on 'fitter's list' for her turn to load coke); *Lawson v Burness* (1862) 1 H & C 396 (entry of vessels intending to load in 'turn book').

18 *Temple, Thomson and Clarke v Runnalls* (1902) 18 TLR 822, CA (loading of stone cargoes).

19 *Aktieselskabet Dampsskibsselskabet Primula v George Horsley & Co Ltd* (1923) 40 TLR 11 (expense of moving cargo after discharge; meaning of 'alongside'; usage not established); *The Rensfjell* (1924) 131 LT 764; *Aktieselskabet Dampskibs Steinstad v Wm Pearson & Co* (1927) 137 LT 533 (mode of discharge).

20 *Brereton v Chapman* (1831) 7 Bing 559 (unloading).

21 *The Rensfjell* (1924) 131 LT 764; *Aktieselskabet Dampskibs Steinstad v Wm Pearson & Co* (1927) 137 LT 533 (mode of discharge).

22 *King v Hinde* (1883) 12 LR Ir 113 (loading of sailing vessels and steamers with coal).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/2. USAGE/(7) MISCELLANEOUS USAGES/(iii) Port and Maritime Usages/693. Usages of foreign and Commonwealth ports.

693. Usages of foreign and Commonwealth ports.

In addition to the usages of United Kingdom ports, many foreign ports, including the ports of Commonwealth countries and colonies, have usages which have been adjudicated upon or recognised in English courts as affecting merchant shippers, underwriters, brokers, and others in this country.

Usages have been recognised or considered with reference to the following ports: Alexandria[1], Archangel[2], Bangor (Maine, USA)[3], Bombay[4], Bunbury (Fremantle, Western Australia)[5], Canton[6], Charleston[7], Ceylon[8], Chilean ports of Iquique and Poti[9], Cork[10], Cuban ports of Cardenas and Havana[11], Demerara[12], Funchal[13], Gibraltar[14], Gothenburg[15], Graciosa[16], Hamburg[17], Jamaica[18], Lake Charles[19], Mauritius[20], Memel (Klaipeda)[21], Newcastle (New South Wales)[22], New Orleans[23], Novorossisk[24], Odessa[25], Onega[26], Oporto[27], Pernambuco[28], St Mary's River (Florida)[29], Sulina[30], Sydney[31], Trinidad[32], Valparaiso[33], Vancouver[34], Wilmington (Carolina)[35].

1 *Rodocanachi v Milburn* (1886) 18 QBD 67, CA (form of bill of lading; usage not established).

2 *Brown v Carstairs* (1811) 3 Camp 161 (sealing down hatches; warehousing until duty paid).

3 *Isis Steamship Co v Bahr & Co* [1899] 2 QB 364, CA; affd [1900] AC 340, HL (loading wood pulp).

4 *Hathesing v Laing* (1873) LR 17 Eq 92 (mate's receipts as negotiable instruments; usage not established).

5 *Aktieselskabet Inglewood v Millar's Karri and Jarrah Forests* (1903) 8 Com Cas 196 (mode of loading).

6 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr 341 (refitting).

7 *Benson v Schneider* (1817) 7 Taunt 272 (cotton bales); *NV Maatschappij Zeevart v M Friescher Soehne* [1962] 1 WLR 534 (working days).

8 *Vanderspar & Co v Duncan & Co* (1891) 8 TLR 30 (meaning of 'lawful merchandise').

9 *Smith and Service v Rosario Nitrate Co* [1893] 2 QB 323; affd [1894] 1 QB 174, CA; *Furness v Forwood Bros & Co* (1897) 13 TLR 500 (loading nitrate).

10 *A/S Sameiling v Grain Importers Eire Ltd* [1952] 2 All ER 315 (discharge otherwise than by direct suction of cargo of grain).

11 *Alvion Steamship Corpn of Panama v Galban Lobo Trading Co SA of Havana* [1955] 1 QB 430, [1955] 1 All ER 457, CA (weather working days).

12 *Lang v Anderdon* (1824) 3 B & C 495 (mode of loading).

13 *Blandy Bros & Co Lda v Nello Simoni Ltd* [1963] 2 Lloyd's Rep 24; affd [1963] 2 Lloyd's Rep 393, CA (different usages alleged by parties as to respective responsibilities of charterer and shipowner in respect of liability for loading and stowage of cargo; neither usage proved).

14 *Tierney v Etherington* (1743) cited in 1 Burr 348 (warehousing in storeship).

15 *The Skandinav* (1881) 51 LJP 93, CA (measurement of timber cargoes).

16 *Cockey v Atkinson* (1819) 2 B & Ald 460 (loading).

17 *Good & Co v Isaacs* [1892] 2 QB 555, CA (unloading).

18 *Stewart v Bell* (1821) 5 B & Ald 238 (unloading).

19 *The Mosfield* [1968] 2 Lloyd's Rep 173 (Saturday mornings treated as holidays).

20 *Lindsay v Janson* (1859) 4 H & N 699 (anchorage); *Ireland v Livingston* (1872) LR 5 HL 395 (making up cargoes).

21 *Lishman v Christie* (1887) 19 QBD 333, CA (loading timber).

22 *Jones Ltd v Green & Co* [1904] 2 KB 275, CA; *Barque Quilpué Ltd v Brown* [1904] 2 KB 264, CA; *Ardan Steamship Co Ltd v Andrew Weir & Co* [1905] AC 501, HL (loading berth for coal).

23 *Benson v Schneider* (1817) 7 Taunt 272 (cotton bales).

24 *Anglo-Hellenic Steamship Co Ltd v Louis Dreyfus & Co* (1913) 108 LT 36 ('arrived ship'; usage not established).

25 *Hick v Tweedy & Co* (1890) 63 LT 765 (calculation of demurrage).

26 *Metcalfe, Simpson & Co v Thompson, Pattrick and Woodwark* (1902) 18 TLR 706 (rate of loading; usage not established).

27 *Kingston v Knibbs* (1808) 1 Camp 508n (loading outside bar).

28 *Duckett v Satterfield* (1868) LR 3 CP 227 (Paraiba; loading cotton).

29 *Moxon v Atkins* (1812) 3 Camp 200 (loading).

30 *Hudson v Ede* (1868) LR 3 QB 412; see *Allerton Sailing Ship Co v Falk* (1888) 6 Asp MLC 287 (a case referring to Birkenhead; loading grain).

31 *Australian Agricultural Co v Saunders* (1875) LR 10 CP 668, Ex Ch (wool bales).

32 *Scrutton v Childs* (1877) 36 LT 212 (lighterage).

33 *Bennetts & Co v Brown* [1908] 1 KB 490, where, however, evidence of the usage was held inadmissible ('surf days').

34 *Reardon Smith Line Ltd v Minister of Agriculture* [1963] AC 691, HL (working days).

35 *Fullagsen v Walford* (1883) Cab & El 198 (computation of weight of resin).

694. Other maritime usages.

A number of usages affecting shippers generally have been established at different times[1].

Numerous maritime usages have also been considered affecting the contractual relationships created by maritime insurance policies and maritime insurance generally[2].

1 *Charleton v Cotesworth* (1825) Ry & M 175 (gratuity to shipmaster for care of goods); *Cuthbert v Cumming* (1855) 10 Exch 809; affd 11 Exch 405 ('full cargo of sugar and/or molasses'); *Alston v Herring* (1856) 11 Exch 822 (notice to shipowner when shipping sulphuric acid); *Russian Steam-Navigation Trading Co v Silva* (1863) 13 CBNS 610 (scale of freights for Baltic trade); *Caughey v Gordon & Co* (1878) 3 CPD 419 (shipmaster's salary includes gratuities such as primage); *Alcock v Leeuw & Co* (1883) Cab & El 98 (meaning of 'about' a certain number); *Loader v London and India Docks Joint Committee* (1891) 65 LT 674; affd 56 JP 165, CA (tightening moorings during loading); *Grange & Co v Taylor* (1904) 20 TLR 386 (unloading by dock company's servants). See also CARRIAGE AND CARRIERS.

2 As to the law of maritime insurance generally see INSURANCE.

The following usages have been recognised: *Lethulier's Case* (1692) 2 Salk 443; *Bond v Gonsales* (1704) 2 Salk 445; *Gordon v Morley, Campbell v Bordieu* (1747) 2 Stra 1265; *Bond v Nutt* (1777) 2 Cowp 601; *Lilly v Ewer* (1779) 1 Doug KB 72; *Delany v Stoddart* (1785) 1 Term Rep 22 (usages as to convoys); *Noble v Kennoway* (1780) 2 Doug KB 510; *Gregory v Christie* (1784) 3 Doug KB 419 (insurance for entire voyage outwards and homewards to cover intermediate voyages); *Anderson v Pitcher* (1800) 2 Bos & P 164; *Ougier v Jennings* (1800) 1 Camp 504n; *Edgar v Fowler* (1803) 3 East 222; *Vallance v Dewar* (1808) 1 Camp 503 (usages of Newfoundland trade); *Cormack v Gladstone* (1809) 11 East 347 (usages of ships sailing from Baltic to America); *Da Costa v Edmunds* (1815) 4 Camp 142 (vitriol on deck from London to Lisbon); *Palmer v Blackburn* (1822) 1 Bing 61 (adjustment of loss on open policy on freight); *Gabay v Lloyd* (1825) 3 B & C 793 (Lloyd's policies for insurance of live stock); *Gould v Oliver* (1840) 2 Man & G 208 (timber from Quebec to London stowed on deck); *Miller v Tetherington* (1862) 7 H & N 954, Ex Ch (Liverpool underwriters; liability for general average or contribution in respect of jettison of goods stowed on deck); *Xenos v Wickham* (1863) 14 CBNS 435 at 447, Ex Ch; revsd without affecting the point as to usage (1866) LR 2 HL 296; *Baines v Ewing* (1866) LR 1 Exch 320 (signing of policies by Liverpool insurance brokers with secret limit on amount assured); *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18; *Imperial Marine Insurance Co v Fire Insurance Corpn Ltd* (1879) 4 CPD 166 (effect of policy on goods by ship to be thereafter declared); *Atwood v Sellar & Co* (1880) 5 QBD 286, CA; *Svendson v Wallace* (1882) 46 LT 742 (average adjustment); *Burton v English* (1883) 12 QBD 218, CA (deck cargoes in Baltic timber trade); *Hick v Tweedy & Co* (1890) 63 LT 765 (loading in Odessa); *Universo Insurance Co of Milan v Merchants Marine Insurance Co* [1897] 2 QB 93, CA; *Matveieff & Co v Crossfield* (1903) 8 Com Cas 120; *Apollinaris Co v Nord Deutsche Insurance Co* [1904] 1 KB 252 (deck cargo on Rhine steamers); *McCowin Lumber and Export Co Inc v Pacific Marine Insurance Co Ltd* (1922) 38 TLR 901 (Lloyd's underwriter to look to broker and not assured); *British and Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41, HL (wool on deck in river navigation in South America).

The following usages have not been recognised: *Milward v Hibbert* (1842) 3 QB 120 (pigs on deck from Waterford to London), but see the Animals (Sea-Transport) Order 1930, SR & O 1930/923, art 2 (amended by SR & O 1932/248); *Green v Sichel* (1860) 2 LT 745 (payment for goods delivered free on board); *Achard v Ring* (1874) 31 LT 647 (general average where ship scuttled in harbour to extinguish fire); *Knight v Cotesworth* (1833) Cab & El 48 (disclosure of name of ship in which goods are expected); *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, HL; and *Newall v Royal Exchange Shipping Co* (1885) 33 WR 868, CA (cotton on deck between New Orleans and Liverpool); *Bartram & Sons v Lloyd* (1903) 88 LT 286 (secret commissions); revsd on the facts (1904) 90 LT 357, CA; *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 (performance of cif contract by tender of broker's cover note of certificate of insurance instead of policy); *Mann Macneal and Steeves v Capital and Counties Insurance Co* [1921] 2 KB 300, CA (disclosure in case of policy on hull and machinery).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(1) NATURE OF MANORS/695. Manors after 1925.

3. MANORS

(1) NATURE OF MANORS

695. Manors after 1925.

Manors[1] were not abolished by the Law of Property Act 1922 or the Law of Property Act 1925, and the provisions of the latter Act relating to freehold land were expressly applied to manors, reputed manors and lordships[2]; but since the enfranchisement of copyholds and customary freeholds on 1 January 1926[3] and the subsequent extinguishment of manorial incidents[4], the

existence, extent and transmission of manors is of considerably less importance than before 1926. Nevertheless, the lordship of a manor may still carry some or all of the manorial rights expressly preserved in 1926[5], of which the most important are the rights to mines and minerals[6] and the sporting rights[7]; it may carry certain appendant franchises[8] and the theoretical right to hold courts[9]; and certain manors held in grand serjeanty are said to carry the right to perform services at the coronation of the monarch[10].

Manorial customs are discussed elsewhere in this title[11].

1 For the legal doctrine of manors, and the law of copyholds generally before 1926, see Scriven on Copyholds (7th Edn) and Watkins on Copyholds (4th Edn), whose value as authorities is stated in *Ecclesiastical Comrs for England v Parr* [1894] 2 QB 420 at 428, CA, per Esher MR.

2 Law of Property Act 1925 s 201(1); as regards Crown manors and the application of the Law of Property Act 1922 to them see REAL PROPERTY vol 39(2) (Reissue) PARA 42.

3 See REAL PROPERTY vol 39(2) (Reissue) PARAS 32-35.

4 See REAL PROPERTY vol 39(2) (Reissue) PARAS 34-35.

5 See PARA REAL PROPERTY vol 39(2) (Reissue) PARA 35.

6 See PARA 712 et seq post.

7 See PARA 711 post.

8 See PARA 720 post.

9 See PARA 699 post.

10 See REAL PROPERTY vol 39(2) (Reissue) PARA 33.

11 See PARAS 641-644 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(1) NATURE OF MANORS/696. The lord.

696. The lord.

The owner of a manor is called the lord of the manor, though the lordship is not a title of dignity and confers no social rank. If the land allotted to the subject by the monarch was sufficiently large to allow of his subordinates in their turn constituting other manors within the parcels allotted to them, the subject, who was called a 'tenant *in capite*' or a 'lord paramount', was said to have an 'honour', and his subordinates were inferior lords or 'mesne lords'[1]. A manor may be part of or appendant to a bishop's see, a rectory, or a parsonage[2], or a prebend[3], or it might be held of another manor[4]. A manor may also belong to the Crown[5] or to the Duchy of Lancaster or the Duchy of Cornwall. The monarch is lord of the manors belonging to the Crown, and the management thereof is vested in the Crown Estate Commissioners[6]. The legal estate is in the Crown[7].

1 Watkins on Copyholds (4th Edn) 5; for instance, the honour of Pontefract (see *Hellawell v Eastwood* (1851) 6 Exch 295) and the honour of Clitheroe. Subinfeudations in fee simple by tenants *in capite ut de corona* (ie tenants holding directly of the monarch in the latter's capacity as lord paramount) were apparently forbidden by 18 Edw 1 (Quia Emptores) (1289-90) c 1. In any case they were impliedly declared invalid by 34 Edw 3 c 15 (Alienation of Crown Lands) (1360-1) (repealed): *Re Holliday* [1922] 2 Ch 698. As to tenants *in capite ut de corona* and *ut de honore* see Challis *Law of Real Property* (3rd Edn) p 4.

2 *Dyke v Bishop of Bath and Wells* (1715) 6 Bro Parl Cas 365; 1 Watkins on Copyholds (4th Edn) 28.

3 *Doe d North v Webber* (1837) 5 Scott 189.

4 Spelman's reading on Quo Warranto, 113 Selden Soc 78; *A-G v Mildmay* (1575) Dyer's reports in 110 Selden Soc 334; cited in *Marshe v Smith* (1585) 1 Leon 26 per Peryman J, sub nom *Morris v Smith and Paget* Cro Eliz 38 at 39; *R v Stafferton* (1610) 1 Bulst 54 at 57 per Fleming CJ; Co Litt 122a. A manor might be held of another manor by copy of court roll: *Sir H Nevil's Case* (1612) 11 Co Rep 17a.

5 As, for instance, the manor of West Sheen or Richmond, in the county of Surrey, and many others.

6 The Commissioners of Crown Lands (formerly the Commissioners of Woods) were reconstituted as the Crown Estate Commissioners by the Crown Estate Act 1956 s 1(1) (repealed); see now the Crown Estate Act 1961 s 1(1). As to Crown manors see REAL PROPERTY vol 39(2) (Reissue) PARA 42; and as to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280 et seq.

7 *R v Powell* (1841) 1 QB 352. As to the Crown as owner of lands see generally CROWN AND ROYAL FAMILY; CROWN PROPERTY.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(1) NATURE OF MANORS/697. Extent of manor.

697. Extent of manor.

The extent of a manor depends upon what was comprised in the original grant by the Crown or superior lord, as the case may be, and may include the foreshore of the sea[1], and modern usage is admissible to explain the meaning of such a grant[2]. The boundaries of a manor rarely extended over more than one parish though there were often many manors in one parish[3].

Manorial lands were not necessarily inclosed by a single boundary or ring-fence, nor did they need to be contiguous. They might be scattered about amongst and intersected by other lands having nothing to do with the manor at all[4].

1 Re Manor of Walton-cum-Trimley, ex p Tomline (1873) 28 LT 12; A-G v Vandeleur [1907] AC 369, HL.

2 Duke of Beaufort v Swansea Corpn (1849) 3 Exch 413; and see Calmady v Rowe (1844) 6 CB 861; and PARA 650 note 6 ante.

3 1 Bl Com 109.

4 Scriven on Copyholds (7th Edn) 2. There were numerous instances of freehold lands being held of the lord of a manor by certain services without being parcel of the manor at all: see Williams on Seisin 29.

UPDATE

697 Extent of manor

NOTE 1--See also *Crown Estate Comrs v Roberts* [2008] EWHC 1302 (Ch), [2008] 3 All ER 828n (claimant failed to rebut presumption that foreshore vested in Crown).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(1) NATURE OF MANORS/698. Evidence as to existence of a manor.

698. Evidence as to existence of a manor.

A manor cannot be created today except by Act of Parliament[1], and the usual method of claiming a manor is by prescription from time immemorial. It is not necessary, in order to prove the existence of a manor, to produce the court rolls or any documentary proofs of the holding of courts; parol evidence of the holding of courts[2], the appointment of gamekeepers[3], surrenders and corresponding admittances purporting to be copies of the rolls of the manor[4], or reputation alone[5] are admissible to prove the existence of a manor. In a proper case the court will presume a lost grant to support the title to a manor[6].

Manors may have been destroyed by merger[7], severance of services[8], acquisition of lands by the lord[9], conveyance or allotment[10] or reduction in the number of tenants[11]. When a manor, in the strict sense, has been thus extinguished, it may neverthelesss survive as a seigniory in gross, or reputed manor, for the purpose of supporting prescriptive or customary rights appendant to the demesnes[12].

1 *Anon* (1541) Bro Abr, Comprise, pl 31; Tenures, pl 102; 2 Rolle Abr 120 (A); *Marshe v Smith* (1585) 1 Leon 26 per Peryam J; sub nom *Morris v Smith and Paget* Cro Eliz 38 at 39; *R v Stafferton* (1610) 1 Bulst 54 at 56 per Yelverton J and Fleming CJ; Hale, Prerogatives of the King, 92 Selden Soc 249; Scriven on Copyholds, ch I s 1. If, however, an ancient manor escheats to the Crown, it is not thereby extinguished and may be granted to a subject.

2 *Doe d Beck v Heakin* (1837) 6 Ad & El 495.

3 See note 2 supra.

4 *Standen v Christmas* (1847) 10 QB 135.

5 *Steel v Prickett* (1819) 2 Stark 463; and see *Brisco v Lomax* (1838) 8 Ad & El 198.

6 *Merttens v Hill* [1901] 1 Ch 842.

7 See 1 Watkins on Copyholds (4th Edn) 15; Coke, Compleat Copyholder s 31; and *Anon* (1541) Bro Abr, Comprise, pl 31; *Tonkin v Croker* (1704) 2 Ld Raym 860 at 864 per Lord Raymond CJ; *A-G v Ewelme Hospital* (1853) 17 Beav 366.

8 See 1 Watkins on Copyholds (4th Edn) 26; *Sir Moyle Finch's Case* (1606) 6 Co Rep 63a; and eg *Soane v Ireland* (1808) 10 East 259; *Curzon v Lomax* (1803) 5 Esp 60.

9 See eg *Delacherois v Delacherois* (1864) 11 HL Cas 62 at 103.

10 See eg *Delacherois v Delacherois* (1864) 11 HL Cas 62; *Paine v Ryder* (1857) 24 Beav 151; *Townley v Gibson* (1788) 2 Term Rep 701 (Inclosure Act).

11 See PARA 699 note 3 post.

12 Trin 9 Edw 4, f 17, pl 17, per Danby CJ (who said a manor could exist solely in demesne, but was challenged on this point by Choke J); *Long v Heminge* (1590) Cro Eliz 209 at 210; 1 Leon 207; 4 Leon 216; Sav 103; 1 And 257; Scriven on Copyholds ch I s 1; and see PARA 699 note 3 post.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(2) MANORIAL COURTS AND COURT ROLLS/699. Manorial courts.

(2) MANORIAL COURTS AND COURT ROLLS

699. Manorial courts.

The manorial courts[1] were the court baron[2], with civil jurisdiction, whose suitors were the free tenants of the manor[3], and the customary court, whose suitors were the copyholders and customary tenants of the manor, and in which surrenders might be effected or presented.

These courts are incident to every manor as of common right. Neither the court baron nor the customary court was normally a court of record[4]. In addition, by virtue of a franchise granted by the Crown, or of prescription, the lord of a manor might be entitled to hold a court leet or view of frankpledge which was a court of record[5] and had a jurisdiction primarily criminal. Such a court, though found as an adjunct, is not an incident to a manor[6].

Manorial courts and courts leet, except the court leet for the Manor of Laxton, have ceased to have any jurisdiction to hear and determine legal proceedings[7], but any such court may continue to sit and transact such other business, if any, as was customary for it immediately before 17 October 1977[8].

1 As to the manorial courts see generally 2 Watkins on Copyholds (4th Edn) 1-44; Scriven on Copyholds (7th Edn) 422-448; Scroggs, Courts Leet and Courts Baron; Selden Society Publications vol 4, The Court Baron; and vol 114, Select Cases in Manorial Courts. A conveyance of a manor operates to convey with the manor all courts leet, courts baron and other courts: see the Law of Property Act 1925 s 62(3); para 708 post; and SALE OF LAND.

2 In the case of manors which were manors of ancient demesne (ie a manor which belonged to the Crown at the death of King Edward the Confessor, and was also entered as *Terra Regis* in Domesday Book), the courts were called courts of ancient demesne: see 4 Co Inst 269.

3 The freeholders were the judges and there must be at least two of them, since one could not judge himself, and indeed to make an effective court and suit there must be more than two frank tenants: see *Chetwode v Crew* (1746) Willes 614; *Bradshaw v Lawson* (1791) 4 Term Rep 443, and 1 Watkins on Copyholds (4th Edn) 8; 2 Watkins on Copyholds (4th Edn) 3n. Since 18 Edw 1 (Quia Emptores) (1289-90) c 1 new frank tenants have not been able to be created by the lords of manors.

The right to hold a court baron is not lost by non-user for a considerable number of years (*R v Steward and Suitors of Havering atte Bower* (1822) 5 B & Ald 691); but, if for lack of suitors a court cannot be held, the court baron is gone for ever and the manor with it (1 Watkins on Copyholds (4th Edn) 8; see *Delacherois v Delacherois* (1864) 11 HL Cas 62 at 79, HL, per Willes J); and see PARA 698 note 11 ante.

4 Co Litt 117b. Cf 113 Selden Soc 13 (a court baron may be a court of record by royal grant).

5 *Griesley's Case* (1588) 8 Co Rep 38a.

6 For the preservation of the lord's franchises on the enfranchisement of copyholds see REAL PROPERTY vol 39(2) (Reissue) PARA 35. The right to hold a court leet might be lost by disuse: *Darell v Bridge* (1748) 1 Wm Bl 46; *Tottersall's Case* (1632) W Jo 283. For the transfer to the High Court and county court of the jurisdiction of courts leet, customary or other courts with reference to certain liabilities preserved on enfranchisement see REAL PROPERTY vol 39(2) (Reissue) PARA 35.

7 Administration of Justice Act 1977 s 23(1), Sch 4. The Lord Chancellor is empowered to make orders for enabling any jurisdiction appearing to him to have been formerly exercised by such a court to be exercised instead by the High Court, the Crown Court, a county court or a magistrates' court: see s 23(4).

Prior to the coming into force of s 23, the jurisdiction of the manorial courts and courts leet had been so limited by successive statutes as to make them obsolete for all practical purposes. Courts baron and leet were expressly preserved by the Sheriffs Act 1887 s 40(1) (repealed). However, the jurisdiction of the court baron to try personal actions was abolished (since it was not a court of record: see note 4 supra) by the County Courts Act 1867 s 28 (repealed) and real actions were abolished by the Real Property Limitation Act 1833 s 36 (repealed). Any residual jurisdiction of both the courts baron and the customary courts to try real actions was transferred to the High Court of Justice or the county court: see the Law of Property Act 1922 s 188(6) (amended by the Courts Act 1971 s 56(4), Sch 11, Pt II); and REAL PROPERTY vol 39(2) (Reissue) PARA 35. The criminal jurisdiction of courts baron and customary courts had long since disappeared: see 1 Watkins on Copyholds (4th Edn) 7; 2 Watkins on Copyholds (4th Edn) 2. Their probate jurisdiction was abolished by the Court of Probate Act 1857 s 3 (repealed). Thus it does not seem that anything remained of the original jurisdiction of the courts baron and customary courts after 1925. The courts leet had limited criminal jurisdiction (see Scriven on Copyholds (7th Edn) 435) which was in practice curtailed by the increased jurisdiction of the justices of the peace following the enactment of the Summary Jurisdiction Act 1848 (repealed) and subsequent statutes.

8 Administration of Justice Act 1977 s 23(1). In the case of the courts specified in Sch 4 Pt III the business that is to be treated as having been customary (apart from business relating to the appointment of officers of the court) is the business specified in relation to that court in Sch 4 Pt III column 2: s 23(1).

UPDATE

699 Manorial courts

NOTE 7--Administration of Justice Act 1977 s 23(4) amended, s 23(6) added: Constitutional Reform Act 2005 Sch 4 para 93.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(2) MANORIAL COURTS AND COURT ROLLS/700. Entries on court rolls.

700. Entries on court rolls.

The proceedings of both the court baron and the customary court were recorded upon the court rolls of the manor[1].

Where a grant of copyhold land had been made to a tenant he might compel an entry of the grant to be made upon the court rolls of the manor; and although it was usual and desirable that a copy of such entry should be given to the tenant, it was not essential, as the entry itself was sufficient[2]. The uses upon which copyholds were held did not require to be entered on the court rolls, but might be indorsed by the steward on the surrender[3].

Every surrender and deed of surrender which a lord was compellable to accept or accepted, and every will a copy of which was delivered to him either at a court at which there was not a homage assembled or out of court, and every grant or admittance made in pursuance of the Copyhold Act 1894[4], had to be entered on the court rolls, and such entry was as valid for all purposes as an entry made in pursuance of a presentment by the homage, and entitled the steward to the same fees and charges[5].

Disentailing assurances[6] and awards of enfranchisement[7] had also to be entered on the court rolls, or they would be void.

1 2 Watkins on Copyholds (4th Edn) 35; Scriven on Copyholds (7th Edn) 423. The earliest court rolls in existence date from the thirteenth century (Vinogradoff *Growth of the Manor* p 185; 2 Holdsworth's History of English Law (3rd Edn) 371). As a result of the general enfranchisement of copyholds by the Law of Property Act 1922 s 128(1) (repealed) (see REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq), it is no longer necessary to make entries in the court rolls for the purpose of maintaining evidence of title to land formerly copyhold but now enfranchised. As to copyhold in general see PARA 642 ante.

2 2 Watkins on Copyholds (4th Edn) 36. But, as to revenue requirements, see PARA 704 post.

3 *Car v Ellison* (1744) 3 Atk 73.

4 Prior to 1926, enfranchisement could be effected both at common law and under a number of statutes repealed and consolidated by the Copyhold Act 1894 (itself repealed by the Statute Law (Repeals) Act 1969): see PARA 643 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 30. Deeds of enfranchisement so effected are not a good root of title: *R v Registrar of Deeds for the County of Middlesex* (1888) 21 QBD 555 at 560-561, CA.

5 Copyhold Act 1894 s 85 (repealed); Wills Act 1837 s 5 (repealed).

6 As to the abolition of enrolment of disentailing assurances generally see the Law of Property Act 1925 s 133 (repealed).

7 Awards of enfranchisement were made on compulsory enfranchisement under the Copyhold Act 1894 (repealed).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(2) MANORIAL COURTS AND COURT ROLLS/701. Custody of court rolls.

701. Custody of court rolls.

On the general statutory enfranchisement of copyholds[1] it was provided that all manorial documents should be under the charge and superintendence of the Master of the Rolls, but that in general they should remain in the possession or under the control of the lord of the manor who should not be entitled to destroy or wilfully damage them[2].

1 See PARA 643 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

2 See the Law of Property Act 1922 s 144A (1), (2), (6) (s 144A added by the Law of Property (Amendment) Act 1924 s 2, Sch 2 para 2). This provision negatives the right of the lord to dispose of the court rolls which had been established by the decision in *Beaumont v Jeffery* [1925] Ch 1. The Master of the Rolls may make inquiries for the purpose of ascertaining that documents are being properly preserved and any documents which are not being properly preserved may, by direction of the Master of the Rolls, be transferred to the Public Record Office, or any local authority, public library, or museum, or historical or antiquarian society, which may be willing to receive them; and the Master of the Rolls is empowered to make rules for the purpose of giving effect to the provisions set out above: see the Law of Property Act 1922 s 144A (3), (4), (7) (as so added); applied by the Local Government (Records) Act 1962 s 7(1); and see the Manorial Documents Rules 1959, SI 1959/1399 (amended by SI 1963/976; SI 1967/963); and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARAS 933, 813.

In certain circumstances, the Master of the Rolls and the Lord Chancellor have power to appoint a judge of the Supreme Court to exercise on behalf of the Master of the Rolls his functions under the Law of Property Act 1922 s 144A (as so added): see the Courts and Legal Services Act 1990 s 73(1), (2), (5)(a), (b); and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 933. In practice, functions relating to manorial documents are carried out by the Royal Commission on Historical Manuscripts: see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 813.

UPDATE

701 Custody of court rolls

NOTE 2--For 'Supreme Court' substitute 'Senior Courts': Constitutional Reform Act 2005 Sch 11 para 4 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(2) MANORIAL COURTS AND COURT ROLLS/702. Right of inspection.

702. Right of inspection.

As regards copyhold land enfranchised under the Law of Property Act 1922, it is provided that any person interested therein may on payment of the fee prescribed by the Lord Chancellor[1] inspect the court rolls of the manor of which the land was held[2], and the Copyhold Act 1894 (now repealed) made similar provision with regard to the inspection and obtaining of copies of court rolls relating to land enfranchised under that Act[3]. Apart from those statutes the purchaser from the lord of the manor of a part of the manorial lands is entitled to an acknowledgment for production and, if the vendor is absolute owner, an undertaking for safe custody[4].

1 Fees for the inspection of documents at the Public Record Office (see PARA 701 note 2 ante) are laid down by the Public Record Office (Fees) Regulations 1998, SI 1998/599. Where documents have been taken out of the custody of the lord of the manor (see PARA 701 note 2 ante), he is entitled to require them to be produced to

him or in accordance with his directions free of any cost: see the Law of Property Act 1922 s 144A(5) (added by the Law of Property (Amendment) Act 1924 s 2, Sch 2 para 2).

2 Law of Property Act 1922 s 144.

3 Copyhold Act 1894 s 62 (repealed). The provisions by which manorial documents are put under the charge of the Master of the Rolls (see PARA 701 note 2 ante) are not to prejudice or affect the right of any person to the production and delivery of copies of any manorial documents: see the Law of Property Act 1922 s 144A(5) (as added: see note 1 supra).

4 *Earl Poulett v Hood* (1868) LR 5 Eq 115 (sale by tenant for life). As to an acknowledgment where copyholds were taken and enfranchised under the Lands Clauses Consolidation Act 1845 see *Re Agg-Gardner* (1884) 25 ChD 600.

UPDATE

702 Right of inspection

NOTE 1--SI 1998/599 replaced: SI 1999/691 (amended by SI 1999/1616).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(2) MANORIAL COURTS AND COURT ROLLS/703. Court rolls as evidence.

703. Court rolls as evidence.

Court rolls of a manor are not documents of record, and do not operate by way of estoppel[1]. They are prima facie evidence[2], and are evidence only against the tenants and the lord of the manor[3]. They were not constructive notice of prior incumbrances appearing on them to a purchaser of copyholds held of the manor[4]. Copies of court rolls are admissible in evidence in proper cases[5].

A surrender or admittance out of court might be proved by an examined copy of the court roll without the original surrender being produced[6].

1 *Burgess v Foster* (1593) 1 Leon 289; and see *Doe d Priestley v Calloway* (1827) 6 B & C 484 at 494.

2 2 Watkins on Copyholds (4th Edn) 38; and see PARA 642 notes 23-24 ante; and *Roe d Beebee v Parker* (1792) 5 Term Rep 26; *Heath v Deane* [1905] 2 Ch 86 at 91 per Joyce J.

3 *A-G v Lord Hotham* (1823) Turn & R 209; and see generally, and particularly as regards proof of court rolls, CIVIL PROCEDURE vol 11 (2009) PARA 925.

4 *Bugden v Bignold* (1843) 2 Y &C Ch Cas 377; and see *Cole v Coles* (1848) 6 Hare 517 (bankruptcy).

5 *Snow v Cutler and Stanly* (1663) 1 Keb 567 (original rolls lost; copy under hand admitted in evidence to prove copyholder's estate); *Breeze v Hawker* (1844) 14 Sim 350 (though not copy delivered to tenant); see the Law of Property Act 1922 s 144 (proof by examined or certified copies); and CIVIL PROCEDURE vol 11 (2009) PARA 925.

6 *Doe d Cawthorn v Mee* (1833) 4 B & Ad 617.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(2) MANORIAL COURTS AND COURT ROLLS/704. Stamp duty.

704. Stamp duty.

Stamp duty concerning dispositions of copyholds[1] is now relevant only to the proof of a disposition[2]. A copy of a court roll given by the steward on a surrender or grant in court[3] had to be stamped[4]. If the surrender or grant was made out of court, the instrument or the memorandum of it bore stamp duty[5]. A copy of a court roll of a surrender or grant made out of court, or the entry upon the roll itself of any surrender or grant, whether made in or out of court, is now available as evidence of the surrender or grant even though the documents required to be stamped as stated above were in fact unstamped[6].

1 This was charged under the former heading 'Copyhold and Customary Estates' in the Stamp Act 1891, Sch 1, at like ad valorem rates as were applicable to conveyances on sale, mortgages, or leases as the case might be; on other occasions a fixed duty was chargeable. Under the Finance (1909-10) Act 1910 s 74(1) (repealed), a voluntary disposition inter vivos became chargeable as a conveyance on sale; the stamp duty chargeable by that section on gifts inter vivos has now been abolished: see the Finance Act 1985 s 82(1), Sch 27 Pt IX.

2 See the provisions of the Stamp Act 1891 ss 61(1)(a), (b), 65-68, 87(4), (5), Sch 1, heading 'Copyhold and Customary Estates'; all these provisions were repealed by the Finance Act 1949 s 52(10), Sch 11, Pt V. By virtue of the Interpretation Act 1978 s 16(1), Sch 2 para 3, a document which was insufficiently stamped before the commencement of the Finance Act 1949 remained after that commencement subject to the qualified prohibition imposed by the Stamp Act 1891 s 14(4) against being given in evidence in civil proceedings. See further STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1007.

3 See PARA 700 ante.

4 See the Stamp Act 1891 s 61(1)(b), Sch 1, heading 'Copyhold and Customary Estates' (repealed: see note 2 supra).

5 See note 4 supra.

6 *Doe d Burrows v Freeman* (1844) 12 M &W 844; *Doe d Garrod v Olley* (1840) 12 Ad & El 481; *Doe d Bennington v Hall* (1812) 16 East 208. The Stamp Act 1891 s 65(2), (3) (repealed: see note 2 supra), superseded these decisions while it was in operation.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(3) OFFICERS OF THE MANOR/705. Office of steward.

(3) OFFICERS OF THE MANOR

705. Office of steward.

The office of steward[1] has not been abolished, but with the enfranchisement of copyholds[2] and subsequent extinguishment of the preserved manorial incidents[3] the office has become for most purposes obsolete, as the powers and duties of the steward were concerned primarily with the creation and transmission of copyhold estates and the operation of manorial incidents. The steward is an officer of the court baron, which may still exist[4]; and notwithstanding that all manorial incidents have been extinguished the acceptance of the office of steward or other principal officer of a Crown manor is deemed to be an acceptance of an office of profit under the Crown[5]. The steward is appointed by the lord and should be learned in the law[6].

1 As to this office see Coke, Compleat Copyholder s 45; 2 Watkins on Copyholds (4th Edn) 17-23.

2 See REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

3 See the Law of Property Act 1922 ss 128(2), 138 (repealed).

4 See PARA 699 ante.

5 See the House of Commons Disqualification Act 1975 s 5. By appointment to such an office (eg that of Steward of the Chiltern Hundreds, or of the Manor of Northstead) a member of Parliament can in effect resign his seat: see PARLIAMENT vol 78 (2010) PARA 895.

6 Spelman's reading on Quo Warranto, 113 Selden Soc 106, 135. (It was, however, sometimes the practice to appoint an honorific chief steward and a deputy steward, learned in the law, to perform the duties). Because the stewardship is an office of trust it was said that it could not be granted for years, because it might then pass to executors; but it is better to regard an appointment for years as impliedly determinable by death within the term: see *Howard v Wood* (1680) T Jo 126; 2 Show KB 21. For the appointment of a steward of a Crown manor see *Harris's Case* (1565) Dyer's circuit reports, 110 Selden Soc 439, overruled in *Harris v Jays* (1599) Cro Eliz 699. See generally Scriven on Copyholds ch XII s 1.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(3) OFFICERS OF THE MANOR/706. Office of bailiff.

706. Office of bailiff.

The bailiff of the court baron was an independent ministerial officer of the court baron. He was not the servant of the steward, and the steward was not responsible for his acts or omissions[1]. He was appointed by parol by the lord or by the steward without any special authority to do so[2].

1 2 Watkins on Copyholds (4th Edn) 23n. Although theoretically the court baron may still exist (see PARA 699 ante), there appear to be no duties that the bailiff can now perform. Formerly he might have to enforce the payment of manorial dues by levy on the goods of a tenant, and the warrant issued to him by the steward directed him to levy so that the bailiff (not the steward) might have the goods of the tenant before the court baron on the day appointed (*Holroyd v Breare* (1819) 2 B & Ald 473, where a difference between the sheriff's bailiff and the bailiff of the court baron is noted; see also *Bradley v Carr* (1841) 3 Scott NR 521). He might also have to seize *quousque* or absolutely. This was done under a precept issued to him by the steward under seal. The bailiff made a return that the seizure had been made, and this was duly entered on the court rolls.

2 Scriven on Copyholds (7th Edn) 434. The office, if granted for life, was a freehold protected by the assize of novel disseisin: *Busby v Fisher* (1574) Dyer's circuit reports, 110 Selden Soc 454; *Webb's Case* (1608) 8 Co Rep 45b at 47b.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(3) OFFICERS OF THE MANOR/707. Powers of bailiff.

707. Powers of bailiff.

The bailiff of a manor could not, by virtue of his office, make a grant of manorial lands to be held by copy of court roll[1]. But by special custom a copyholder might surrender out of court to the bailiff, and if there was a further special custom enabling him, he might so surrender by attorney[2].

1 1 Watkins on Copyholds (4th Edn) 36.

2 1 Watkins on Copyholds (4th Edn) 103; Co Litt 59a; and see PARA 642 note 5 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(4) TRANSFER AND DIVISION OF MANORS/708. Transmission and devolution.

(4) TRANSFER AND DIVISION OF MANORS

708. Transmission and devolution.

A freehold manor will devolve and may be transmitted in the same manner and by the same means, and subject to the same rules of law and equity, as an ordinary freehold[1].

Unless a contrary intention is expressed in a conveyance of a manor it will generally include the manor house (or mansion), the demesne lands, the freehold lands held of the manor, the waste lands and the soil and minerals thereunder[2], and generally (so far as the lord's rights have not been affected by the enfranchisement of copyholds), all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries[3], furzes, trees, woods, underwoods, coppices and the ground and soil thereof[4], fishings, fisheries, fowlings[5], courts leet, courts baron, and other courts, view of frankpledge and all belonging thereto[6], mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amercements, waifs, estrays, chief rents, quit rents, rents charge, rents seck, rents of assize, fee farm rents, services[7], royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments appertaining or reputed to appertain to the manor or at the time of conveyance demised, occupied, or enjoyed with it or reputed or known as part, parcel, or member of it, and for this purpose the right to compensation for manorial incidents on the extinguishment thereof is deemed to be a right appertaining to the manor; but no more will be conveyed than the party conveying has to convey[8].

A conveyance of a reputed manor[9], in the absence of expressed contrary intention, has the same effect as the conveyance of a manor[10].

A devise of a manor carries the demesne lands[11].

1 See EXECUTORS AND ADMINISTRATORS; REAL PROPERTY; WILLS. A manor may be leased or mortgaged. As regards sales by a tenant for life of a settled manor see the Settled Land Act 1925 ss 38(i), 117(1)(xiv); and SETTLEMENTS vol 42 (Reissue) PARA 827 et seq. As to whether, on a conveyance of particular real estate, general words will pass a manor see *Rooke v Lord Kensington* (1856) 2 K & J 753. As to the statutory restrictions on the creation of a strict settlement on or after 1 January 1997 see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

2 *Cator v Croydon Canal Co* (1841) 4 Y & C Ex 405; affd (1843) 4 Y & C Ex 593.

3 For the lord's rights to mines and minerals see generally paras 712-719 post. For the saving of such rights on the general enfranchisement of copyholds see REAL PROPERTY vol 39(2) (Reissue) PARA 35. As to the extinguishment of such rights by agreement see the Law of Property Act 1922 ss 138-143 (repealed).

4 For the temporary saving and final extinguishment of the lord's rights as to timber over enfranchised land on the general enfranchisement of copyholds see PARA 722 post.

5 As to the lord's fishing and sporting rights see PARAS 720-721 post. For the saving of such rights on the general enfranchisement of copyholds see REAL PROPERTY vol 39(2) (Reissue) PARA 35. As to the extinguishment of such rights by agreement see note 3 supra.

6 As to the manorial courts see PARA 699 ante. The view of frankpledge, ie of the mutual pledges given by freemen for the good behaviour of one another, was formerly a function of the court leet: see 4 Bl Com 270.

7 For the temporary saving and final extinguishment of these incidents in relation to enfranchised land upon the general enfranchisement of copyholds see PARA 722 post.

8 Law of Property Act 1925 s 62(3), (4), (5). As to former copyhold allotments purchased by trustees of a manor see *Hicks v Sallitt* (1854) 3 De GM & G 782 at 793.

9 Ie manors whose existence can only be proved by reputation. See 1 Watkins on Copyholds (4th Edn) 27; Scriven on Copyholds (7th Edn) 3.

10 See the Law of Property Act 1925 s 205(1)(ix), which re-enacts the Conveyancing Act 1881 s 2(iv) (repealed). A conveyance of a reputed manor prior to 31 December 1881 did not pass the freehold interest of the grantor in the waste or any specific tenement possessed by the grantor (*Doe d Clayton v Williams* (1843) 11 M & W 803), but only those franchises and appurtenances, if any, which belonged thereto (*Soane v Ireland* (1808) 10 East 259).

11 *Hicks v Sallitt* (1854) 3 De GM & G 782.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(4) TRANSFER AND DIVISION OF MANORS/709. Division of manor.

709. Division of manor.

It is probable that a manor could have been partitioned or divided by operation of law[1] (but not by act of party), into several manors, with several courts baron for each[2].

1 See Trin 26 Hen 8, f 4, pl 15; *Marshe v Smith* (1585) 1 Leon 26 per Peryam J, sub nom *Morris v Smith and Paget* Cro Eliz 38 at 39; *R v Stafferton* (1610) 1 Bulst 54 at 56 per Fleming CJ; *Beverly's Case* (circa 1627) Lat 224 per Dodderidge J; *Hanbury v Hussey* (1851) 14 Beav 152; *Sparrow v Fiend* (1761) 14 Beav 156; *Heath v Deane* [1905] 2 Ch 86 at 91, per Joyce J.

2 The point is doubtful, but this seems to be the better opinion. The authorities in favour of the validity of division are YB 43 Edw 3, f 11; 105 Selden Soc 164, pl 50 (Inner Temple moot, circa 1490); *Harris and Haies v Nichols* (1583) Cro Eliz 19; *Marshe v Smith* (1585) 1 Leon 26, sub nom *Morris v Smith and Paget* (1583) Cro Eliz 38; Owen 138; and see *Sir Anthony Denny's Case* (1590) 2 Leon 190. The authorities against its validity are *Bright v Forth* (1595) Cro Eliz 442; *Melwich v Luter* (1588) 4 Co Rep 26a note at end of third resolution; *Sir Moyle Finch's Case* (1606) 6 Co Rep 63a; *R v Duchess of Buccleugh* (1702) 6 Mod Rep 150; see 1 Watkins on Copyholds (4th Edn) 15 et seq; Scriven on Copyholds (7th Edn) 10; Elton on Copyholds (2nd Edn) 10.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(i) In general/710. Continuance of the rights.

(5) RIGHTS OF THE LORD OF THE MANOR

(i) In general

710. Continuance of the rights.

As described in more detail elsewhere in this work[1], the statutory enfranchisement of copyhold land on 1 January 1926 preserved to the lord of the manor certain rights which had been his, as lord of the manor, and in discussing such rights it is convenient to use the terms 'lord' and 'tenant'. In the paragraphs which follow, the term 'tenant' is retained[2] and includes persons who hold land which was formerly copyhold but was enfranchised in 1926[3].

1 See REAL PROPERTY vol 39(2) (Reissue) PARA 35. See also PARA 643 ante.

2 Cf the definition in the Law of Property Act 1922 s 189 (repealed), where a similar use is made of the word 'tenant'.

3 As to the enfranchisement see REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(i) In general/711. Manorial and owner's rights contrasted.

711. Manorial and owner's rights contrasted.

A lord of the manor who is owner of the soil of manorial lands or wastes is as such entitled to all the rights and privileges of a freeholder save in so far as he may be bound by commonable or other rights preserved to or subsisting in other persons[1]. Thus, for example as owner he may enjoy sporting rights over manorial lands[2], or may enjoy a franchise which was granted to him, or a predecessor in title[3].

1 See COMMONS vol 13 (2009) PARA 556.

2 See PARAS 720-721 post.

3 See PARA 720 post; and COMMONS vol 13 (2009) PARA 408.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/712. General rule.

(ii) Mines and Minerals

712. General rule.

As a general rule the mines and minerals in or under manorial lands are the property of the lord[1], although where there are tenants of the manor the possession is in the tenant, who may therefore maintain trespass against third parties for breaking and entering below the surface, even though no trespass is committed on the surface[2]. The lord may bring an action against any one taking such mines and minerals, to recover the same[3]. Where the mines belong to the lord, and there is no custom allowing the tenant to work them, neither the lord nor the tenant can work them without the licence of the other[4].

1 The enfranchisement under the Law of Property Act 1922 did not affect any right of the lord or tenant in mines and minerals (see REAL PROPERTY vol 39(2) (Reissue) PARA 35); but the lord's rights might be extinguished by agreement; see the Law of Property Act 1922 ss 138-143 (repealed). As to customary mineral rights see also PARA 644 ante.

2 *Lewis v Branthwaite* (1831) 2 B & Ad 437; *Re Clavering, Public Trustee v Clavering* [1915] WN 195; as to the ownership of mines in allotments under an Inclosure Act see *St Catharine's College, Cambridge v Rosse* [1916] 1 Ch 73, CA. For the effect of the nationalisation of coal mines and the later privatisation of the coal industry see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 2-3; and as to mining rights after inclosure of the waste of a manor see COMMONS vol 13 (2009) PARA 562 et seq.

In matters not specially provided for by manorial law and custom, the relation between lord and copyholder was analogous to the ordinary case of owner and tenant. Thus the lord was entitled to share in compensation in respect of copyhold licensed premises payable under the Licensing Act 1904 s 2 (repealed): *Ecclesiastical Comrs for England v Page* [1911] 2 KB 946.

3 *Eardley v Granville* (1876) 3 ChD 826.

4 *Bishop of Winchester v Knight* (1717) 1 P Wms 406; *Aspden v Seddon* (1876) 1 ExD 496 at 510, CA, per Mellish LJ. In a proper case the High Court will at the instance of the lord grant an interlocutory injunction to restrain the working of mines within a manor, notwithstanding that the defendant alleges that the minerals are under freehold lands subject only to a quit rent payable to the lord: *Greenwich Hospital Comrs v Blackett* (1848) 12 Jur 151.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/713. Mines under freehold tenement.

713. Mines under freehold tenement.

As regards minerals under a tenement granted as a freehold within a manor, the presumption is that the property in the minerals, as well as the possession of them, is in the tenant. This presumption is, however, rebuttable; and it is open to the lord to prove by evidence of general reputation and acts of ownership by the lord as to the minerals under other similar tenements within the ambit of the manor that the minerals in question belong to the lord, and not to the tenant[1]. If tenants of customary freeholds[2] or their lessees had for a number of years openly worked the coal and other minerals under their tenements to the knowledge of the lord, it was a question of proof of custom whether the tenants had a right to get such minerals[3].

1 *Barnes v Mawson* (1813) 1 M & S 77.

2 Such tenants held of the manor according to the custom of the manor, but not at the will of the lord; copyhold tenants held at the will of the lord according to the custom of the manor: *Delacherois v Delacherois* (1864) 11 HL Cas 62 at 83, HL, and see further Scriven on Copyholds (7th Edn) 14-15. As to the enfranchisement of customary freeholds see REAL PROPERTY vol 39(2) (Reissue) PARA 32.

3 *Parrott v Palmer* (1834) 3 My & K 632. See also PARA 644 note 2 ante.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/714. Mines under copyhold tenement.

714. Mines under copyhold tenement.

Mines and minerals under copyhold tenements of a manor belonged to the lord, but, as the estate of the copyholder was in the soil throughout his tenement (except the mines and minerals), the lord, in the absence of custom or other enabling power, could not get them without rendering himself liable to an action for trespass at the suit of the tenant[1]; and this was so notwithstanding that the tenant had let the surface to a third party[2]. Large stones embedded in the soil of a copyhold tenement prior to the commencement of the holding, which had been there as far back as living memory went, were part of the tenement, and belonged to the lord to the same extent as the tenement, and therefore could not be disposed of by the tenant; but it was otherwise if such stones had come upon the tenement since the tenancy began[3]. Since the rights of the lord in respect of mines and minerals are excepted out of the general enfranchisement effected by statute[4], this doctrine applies to enfranchised copyhold tenements; though where there is danger that it will result in the minerals being left unworked, the High Court[5] may, after a preliminary application to the Secretary of State[6], grant a right to work the minerals[7].

1 *Eardley v Granville* (1876) 3 ChD 826; and see *Batten Pooll v Kennedy* [1907] 1 Ch 256.

2 *Bowser v Maclean* (1860) 2 De GF & J 415.

3 *Dearden v Evans* (1839) 5 M & W 11.

4 See REAL PROPERTY vol 39(2) (Reissue) PARA 35.

5 The High Court now exercises the functions in this respect formerly exercisable by the Railway and Canal Commission: Railway and Canal Commission (Abolition) Act 1949 s 1; and see RSC Ord 96 r 1.

6 The Secretary of State now exercises the functions formerly exercised by the Minister of Power in relation to mines and minerals: see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 4.

7 See the Mines (Working Facilities and Support) Act 1966; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 383 et seq. As to rights to work coal in former copyhold land see also the Coal Industry Act 1994 ss 49, 50; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 400 et seq. For the preservation of such interests on enfranchisement see REAL PROPERTY vol 39(2) (Reissue) PARA 35. For planning provisions concerning mineral workings see TOWN AND COUNTRY PLANNING.

UPDATE

714 Mines under copyhold tenement

TEXT AND NOTE 5--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/715. Rights regulated by custom.

715. Rights regulated by custom.

The rights as to minerals of the lord on the one hand and of the tenants on the other may be regulated by custom[1]. Apart from custom, the lord has no right as lord to enter upon a former copyhold tenement of the manor to bore for and work mines or minerals[2]; and the tenant may obtain an injunction restraining him from doing so[3].

1 1 Watkins on Copyholds (4th Edn) 405n; *Aspden v Seddon* (1876) 1 ExD 496, CA. For instances of customs authorising copyhold tenants to get minerals out of their holdings see *Hanmer v Chance* (1865) 4 De GJ & Sm 626 (sand, gravel and clay); *Marquis of Salisbury v Gladstone* (1861) 9 HL Cas 692 (clay); *Sitwell v Worrall* (1898) 79 LT 86 (coal); and *Curtis v Daniel* (1808) 10 East 273 (usage establishing lord's right to tin also established tenant's right to copper). See also PARA 644 ante.

2 *Bourne v Taylor* (1808) 10 East 189.

3 *Grey v Duke of Northumberland* (1809) 17 Ves 281. In an action by a copyholder against a stranger to restrain him from getting minerals under the copyhold tenement, the lord might be joined as a defendant: *Shafto v Bolckow, Vaughan & Co* (1887) 34 ChD 725.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/716. Extent of lord's rights.

716. Extent of lord's rights.

Where the lord has a right to work the minerals under manorial lands, he may construct a tramway through the subsoil of the manorial lands for the purpose of working the mines which are within the manor, but not for other purposes, or for carrying minerals got under lands outside the manor[1].

Where minerals have been taken from under a former copyhold tenement, the tenant may occupy and enjoy the space so left. Thus, he may descend the shaft of a mine and use the excavations below for any rational purpose[2].

1 *Bowser v Maclean* (1860) 2 De GF & J 415; *Eardley v Granville* (1876) 3 ChD 826 at 833, per Jessel MR.

2 *Eardley v Granville* (1876) 3 ChD 826.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/717. Mines and minerals in and under wastes.

717. Mines and minerals in and under wastes.

The mines under the waste and demesne lands of a manor belong prima facie to the lord[1] and pass with the soil on a conveyance of those lands, unless specially reserved[2].

The lord may take gravel, marl, loam and the like from the waste of the manor, so long as he does not infringe upon the commoners' rights, his right to do so being quite independent of his right of approvement by statute or at common law, and existing by reason of his ownership of the soil, subject only to the interests of the commoners, if any, upon whom lies the burden of showing that their rights have been thereby injured[3].

1 *Filewood v Palmer* (1729) Mos 169; *Place v Jackson* (1824) 4 Dow & Ry KB 318; *Roberts v Haines* (1856) 6 E & B 643; affd sub nom *Haines v Roberts* (1857) 7 E & B 625, Ex Ch; *A-G v Hanmer* (1858) 27 LJ Ch 837.

2 *Townley v Gibson* (1788) 2 Term Rep 701; and see PARA 708 ante.

3 *Hall v Byron* (1877) 4 ChD 667. As to the lord's right of approvement see COMMONS.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/718. Grant of surface.

718. Grant of surface.

Where the lord parted with the surface of lands within the manor, whether waste or copyhold, and whether by legislative enactment or by deed inter partes, he could not work the minerals beneath the surface of such lands so as to destroy it, either unconditionally or upon payment of compensation, unless express power to do so was given or reserved to him by such enactment[1] or deed[2].

1 Duke of Buccleuch v Wakefield (1870) LR 4 HL 377.

2 Hext v Gill (1872) 7 Ch App 699. The law as to subsidence underwent considerable change in the early years of this century; see Butterknowle Colliery Co v Bishop Auckland Industrial Co-operative Co [1906] AC 305, HL; Butterley Co Ltd v New Hucknall Colliery Co Ltd [1910] AC 381, HL; Welldon v Butterley Co Ltd [1920] 1 Ch 130; Thomson v St Catharine's College, Cambridge etc [1919] AC 468, HL; cf paras 644, 715 ante; and see MINES, MINERALS AND QUARRIES.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(ii) Mines and Minerals/719. Crown manor.

719. Crown manor.

If a holder of enfranchised copyhold lands in a Crown manor brings an action of trespass against the licensee of the Crown in respect of minerals under his tenement, the Crown may take proceedings to stay the action and to have a declaration of the rights of the Crown within the manor[1].

1 *A-G v Barker* (1872) LR 7 Exch 177. The right of the Crown to control or intervene in proceedings affecting its rights is not affected by the Crown Proceedings Act 1947 s 40(2)(g). As to proceedings by the Crown see generally CROWN PROCEEDINGS AND CROWN PRACTICE.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(iii) Franchises/720. Franchises.

(iii) Franchises

720. Franchises.

Certain franchises granted out of the royal prerogative[1] may be vested in lords of manors, either by special grants or by prescription, which presupposes a former grant[2]. Although these franchises are not manorial rights properly so called, but mere adjuncts, and not incidental or essential to manors generally[3], some were expressly preserved on the general statutory enfranchisement[4]. Such franchises are the rights to wreck[5], treasure trove[6], waifs and estrays[7], all of which are the prerogative rights of the Crown but which may validly be granted to subjects. Franchises which may be granted not out of the prerogative but by virtue of it[8] are the right to hold markets and fairs[9], and fisheries (at any rate in respect of the royal fish)[10].

1 For the distinction between franchises granted out of the prerogative and franchises granted by virtue of the prerogative see *A-G v British Museum Trustees* [1903] 2 Ch 598 at 612-613; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 879.

2 See generally CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 879. As to franchises appendant to manors, and how they were claimed or extinguished, see Spelman's reading on Quo Warranto, 113 Selden Soc.

3 Co Litt 114 b; *Dickens v Shaw* (1823) 1 LJOSKB 122, reported in Hall on the Seashore (2nd Edn) xlv at lxiv, per Bayley J; *Scratton v Brown* (1825) 4 B & C 485 at 497. A reputed manor (see PARA 708 note 9 ante) may be of value merely in order to support franchises such as those enumerated in the text. A right of presentation to a hospital cannot be annexed to a manor so as to be inseparable from it, but may be alienated apart from the manor: *A-G v Ewelme Hospital* (1853) 17 Beav 366; and see further CHARITIES vol 8 (2010) PARAS 110-111, 124.

4 See REAL PROPERTY vol 39(2) (Reissue) PARA 35. The remainder, by their nature, were not affected by the Law of Property Act 1922.

5 See CROWN PROPERTY vol 12(1) (Reissue) PARA 270 et seq. See also SHIPPING AND MARITIME LAW vol 93 (2008) PARA 122 et seq; SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1003. Some early readings on the law of wreck are printed in 113 Selden Soc 27-42.

6 See NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1084 et seq. See also CROWN PROPERTY vol 12(1) (Reissue) PARA 373.

7 See CROWN PROPERTY vol 12(1) (Reissue) PARAS 371-372.

8 See note 1 supra.

9 See MARKETS, FAIRS AND STREET TRADING.

10 See, as regards the royal fish, CROWN PROPERTY vol 12(1) (Reissue) PARA 229 ante; and, as regards franchise fisheries not existing in respect of other fish, AGRICULTURE AND FISHERIES vol 1(1) (2007 Reissue) PARA 807. The franchises of forest, free chase, park or free warren were abolished by the Wild Creatures and Forest Laws Act 1971 s 1(1)(b).

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(iii) Franchises/721. Proof of franchises.

721. Proof of franchises.

Reputation and declarations of deceased persons are admissible to prove the lord's rights by prescription to a general right over an entire manor[1]. If the lord claims a several fishery in a river flowing through inclosed lands within the bounds of a manor, he must establish his rights by evidence[2]. In general, 20 years' uninterrupted user is presumptive evidence in favour of a claimant[3].

1 *Earl of Carnarvon v Villebois* (1844) 13 M & W 313. This case concerned a right of free warren which right is now abolished (see PARA 720 note 10 ante) but such proof is admissible in respect of any right which affects a considerable section of the community. As to the admissibility of evidence of reputation and declarations by deceased persons in proof of rights see generally CIVIL PROCEDURE.

2 *Lamb v Newbiggin* (1844) 1 Car & Kir 549.

3 See, for example, *Bealey v Shaw* (1805) 6 East 208 at 215; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 879.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(iv) Other Rights and Remedies/722. General abolition and extinguishment of rights.

(iv) Other Rights and Remedies

722. General abolition and extinguishment of rights.

The lord's rights as to quit and chief rents, fines, reliefs, heriots, dues and forfeitures, and his rights as to timber, were temporarily saved by the Law of Property Act 1922[1], but were extinguished by 1 January 1940[2]. The lord's right to grant licences disappeared with forfeitures. Escheat[3] was abolished on the general statutory enfranchisement[4], but, with forfeiture[5], it may affect titles accruing before 1926.

1 Law of Property Act 1922 s 128(2) (repealed).

2 Ibid s 138 (repealed).

3 Land escheated to the lord where a tenant died intestate without leaving an heir: Co Litt 13a.

4 See REAL PROPERTY vol 39(2) (Reissue) PARA 34.

5 Forfeiture for the conveyance or attempted conveyance of an estate of freehold, or for alienation without licence, was abolished on the general enfranchisement of copyholds (Law of Property Act 1922 s 128(2), Sch 12

para (1)(a) (repealed)); forfeitures on other grounds were temporarily saved: s 128(2) proviso (c) (repealed). But after 1925 a forfeiture had to be enforced by an action for possession, and the tenant had the right to apply to the court for relief: see s 132 (repealed); the Law of Property Act 1925 s 146 (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 264.

Halsbury's Laws of England/CUSTOM AND USAGE (VOLUME 12(1) (REISSUE))/3. MANORS/(5) RIGHTS OF THE LORD OF THE MANOR/(iv) Other Rights and Remedies/723-800. Distress for compensation rentcharges.

723-800. Distress for compensation rentcharges.

The owner of a compensation rentcharge created on the enfranchisement of copyhold land under the Copyhold Act 1894 (now repealed), or of a certificate of charge under that Act, has the right to distrain if any part of the rentcharge, or sum in the nature of interest or periodical payment becoming due under the certificate, is unpaid for 21 days[1]. The owner of such a certificate of charge also has, for the recovery of any sum in the nature of interest or periodical payment, the same remedies as a mortgagee[2]. A certificate of charge is transferable by indorsement on the certificate[3].

1 See the Statute Law (Repeals) Act 1969 s 3(a). This provision extends to compensation rentcharges and certificates of charge the remedies conferred by the Law of Property Act 1925 s 121, as to which see RENTCHARGES AND ANNUITES vol 39(2) (Reissue) PARA 869 et seq.

2 See the Statute Law (Repeals) Act 1969 s 3(b).

3 See ibid s 3(c).